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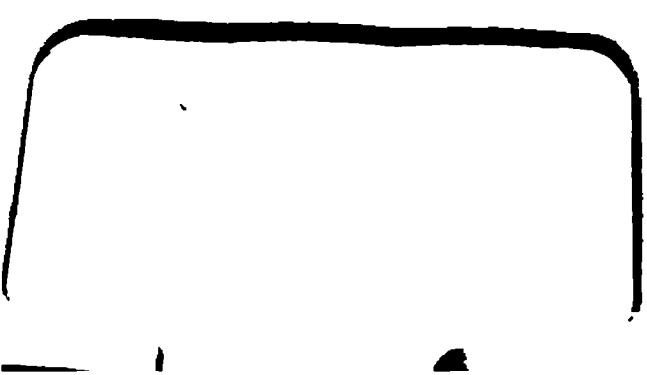
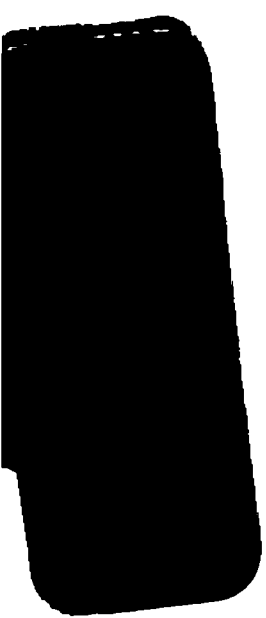
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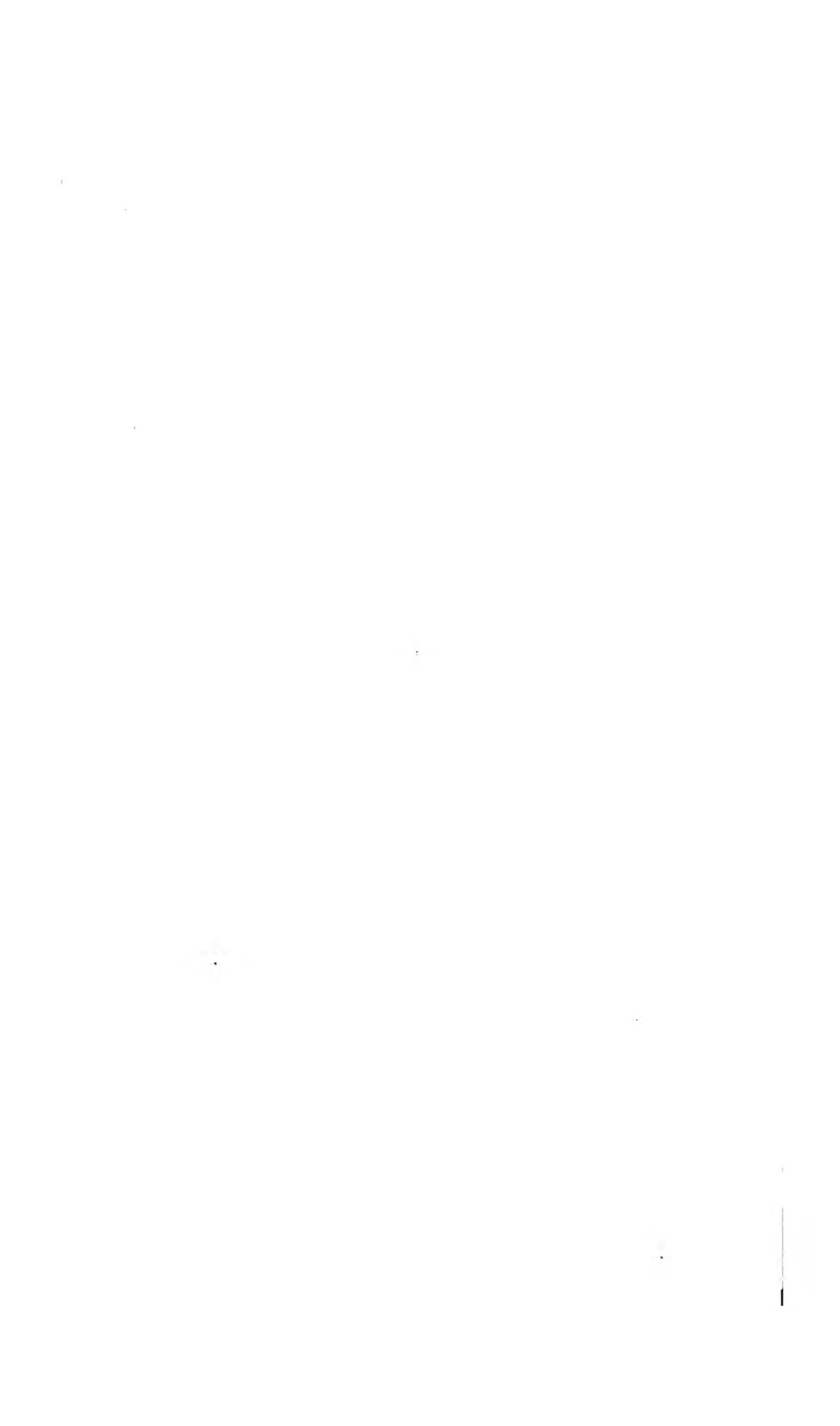
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REPORTS
OF
CASES ARGUED AND
IN THE
CIRCUIT COURT OF THE
FOR THE
SEVENTH CIRCUIT

BY JOHN M.
CIRCUIT JUDGE

VOL. II.

COLUMBUS
PUBLISHED BY H. W. DERBY
1843.

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the Clerk's Office of the District Court for the District of Ohio.

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COLUMBUS:
SAMUEL MEDARY'S POWER PRESS PRINT.

JUDGE HOLMAN.

IN the spring of 1842, Judge HOLMAN, of the District Court of Indiana, deceased, and Judge Huntington was appointed in his place.

Judge Holman was appointed District Judge some years before Indiana was included in the Seventh District. On the organization of the State Government he was appointed one of the Supreme Judges of Indiana, and continued to serve in that capacity until a short time before he received the appointment of District Judge. He commenced his professional life in Kentucky, but removed into Indiana several years before it became a State.

Judge Holman was a sound lawyer, and a man of good mind. In all the relations of life he was most exemplary; and, as a Judge, he was above reproach. His loss was regretted, universally, by the profession; and to his family and connections it was irreparable. He died as a good man would desire to die, in the full assurance of a blissful immortality.

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CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1838.

A CHARGE

TO THE GRAND JURY, AT DECEMBER TERM, 1838.

In regard to aiding or favoring unlawful military combinations, by our citizens, against any foreign government, or people, with whom we are at peace.

Your particular and most serious attention is requested to the provisions of an act entitled "an act to punish certain offences against the United States."

By the first section of this act, it is declared, "that if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, with whom the United States are at peace, he shall be deemed guilty of a high misdemeanor, and be fined not more than two thousand dollars, and imprisoned not exceeding three years."

And in the sixth section, it is provided, "that if any person shall, within the territory or jurisdiction of the United States, begin to set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence, against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United

A charge to the Grand Jury.

States are at peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

There are many other acts prohibited by this law, which relate to foreign powers, and which may be presented for your examination; but the above sections are considered the most important.

The offence in the first section consists in "accepting and exercising a commission," to carry on war against any people or state with whom we are at peace.

The commission may be conferred by any district of country, or association of people, whose right to confer it shall be recognized by the person appointed. And it is immaterial whether the commission has been conferred by the popular voice, or by the representatives of such district, or association of people.

It must have been accepted and exercised, to come within your jurisdiction, within this State, by a citizen of the United States. Some overt act, under the commission, must be done; such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission is supposed to confer.

Under the ninth section, the offence consists in beginning to set on foot, or providing or preparing the means for any military expedition or enterprise, to be carried on from the United States, against the territory or dominions of a foreign people or state.

To "begin to set on foot a military expedition," is not actually setting on foot such expedition; but it is making such preparation for it, as shall show the intent to set it on foot.

To "provide or prepare the means for any military expedition or enterprise," within the law, such preparation must be made as shall aid the expedition. The contribution of money,

clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort or maintenance of those who are engaged in it, is considered to be in violation of the law.

These acts must all be done under such circumstances as to show the criminal intent, unless such intent shall be avowed. And it is hardly to be expected, that when an individual is about to violate the laws of his country, he will openly declare his intention to do so.

Where the act and the attendant circumstances show the criminal intent, no subterfuges or motives avowed, should screen the citizen from the consequences of such an act.

To come within your cognizance, every violation of this law must have been committed within this State; and by a citizen of the United States.

These provisions are highly important, and they should be faithfully executed against all who violate them.

Great excitement is known to exist, at this time, in Canada, from certain hostile movements contemplated by citizens of this country, in conjunction with the disaffected subjects of that country. It is said, on high authority, that associations of citizens of the United States have been formed, along the whole extent of our northern boundary, with the view, at a fixed time, to make a descent upon Canada. That these associations embrace an immense number of individuals, who are known to each other by certain signs and passwords. That they are actively engaged in collecting the materials of war, and raising men. That their military officers are appointed; and that, in anticipation of success, they have appointed civil officers.

I cannot but think these accounts have been greatly exaggerated, and that they may have caused an unnecessary

degree of alarm. But that there is ground for apprehension of danger, no one can doubt.

During the past winter, many of our citizens were engaged in this lawless enterprise. This is proved by the records of our own courts, and the courts of Canada, and by well authenticated accounts which have been published. Indeed, it is notorious that organized bodies of men, though, perhaps, not bearing arms, were marched through the northern part of this and other states, on our northern boundary, with the known intention of invading Canada, who were permitted to pass without molestation. And, it is believed that, in some instances, they were encouraged in their enterprise by contributions of money, provisions, and other necessities.

This state of things is deeply to be lamented. When our citizens, generally, shall cease to respect the laws, and the high duties they owe to their own government, there is but a slender ground of hope that our institutions can be long maintained.

An obedience to the laws is the first duty of every citizen. It lays at the foundation of our noble political structure; and when this great principle shall be departed from, with the public sanction, the moral influence of our government must terminate.

If there be any one line of policy in which all political parties agree, it is, that we should keep aloof from the agitations of other governments. That we shall not intermingle our national concerns with theirs. And much more, that our citizens shall abstain from acts which lead the subjects of other governments to violence and bloodshed.

We have a striking instance of the wisdom of this policy in the early history of our government.

During the administration of our first President the French Revolution burst forth, and astonished the civilized world. All

A charge to the Grand Jury.

Europe combined in arms against republican France. That France which had mingled her arms and her blood with ours in our struggle for independence.

That this country should deeply sympathize with so noble, brave and generous an ally, in such a struggle, was natural. Bursts of enthusiasm were witnessed in her behalf, in almost every part of our country, and an ardent desire was evinced to make common cause with her in favor of liberty. And this was claimed of our country as a debt of gratitude, and on the ground of treaty stipulations.

Had this tide of popular feeling, which threatened to bear down every thing in its course, not been checked, our destinies would have been united with those of France. We might have participated in her military glory, and in the renown of her heroes. And the struggles, in which we would have been involved, might have given birth to a race of heroes in our own country, whose deeds of chivalry would have been celebrated in history. But our country would have been wasted by war and rapine; and the pen of the historian, which recorded the deeds of our heroes, would, also, have told, in all probability, that our country, like France, was driven to take refuge from the turbulence of party factions, under a splendid military despotism.

Fortunately for the country Washington lived, and the veneration in which his name was held, and the authority he exercised, mainly contributed to check the excitement, and preserve the peace and lasting prosperity of the country.

The struggles of the people of South America, against the oppressions of their own government, again awakened the sympathies of our country, and produced a strong desire with many to unite our fortune with theirs. But this feeling was controlled, and the neutrality and peace of our country were preserved.

A charge to the Grand Jury.

A government is justly held responsible for the acts of its citizens. And if this government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it. Every citizen is, therefore, bound by the regard he has for his country, by his reverence for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power.

History affords no example of a nation or people, that uniformly took part in the internal commotions of other governments, which did not bring down ruin upon themselves. These pregnant examples should guard us against a similar policy, which must lead to a similar result.

In every community will be found a floating mass of adventurers, ready to embrace any cause, and to hazard any consequences, which shall be likely to make their condition better. And, it is believed, that a large portion of our citizens, who have been engaged in military enterprises against Canada, are of this description.

That many patriotic and honorable men were at first induced, by their sympathies, to countenance the movement, if not to aid it, is probable. But when these individuals found that this course was forbidden by the laws of their country, and by its highest interests, they retraced their steps. But, it is believed, that there are many who persevere in their course, in defiance of the law and the interests of their country. Such individuals might be induced to turn their arms against their own government, under circumstances favorable to their success.

These violators of the law should not escape with impunity. The aid of every good citizen will be given to arrest them in their progress, and bring them to justice. They show them-

A charge to the Grand Jury.

selves to be enemies of their country, by trampling under foot its laws, compromising its honor, and involving it in the most serious embarrassment with a foreign and friendly nation. It is, indeed, lamentable to reflect, that such men, under such circumstances, may hazard the peace of the country.

If they were to come out in array against their own government, the consequences to it would be far less serious. In such an effort, they could not involve it in much bloodshed, or in a heavy expenditure; nor would its commerce and general business be materially injured. But a war with a powerful nation, with whom we have the most extensive relations, commercial and social, would bring down upon our country the heaviest calamity. It would dry up the sources of its prosperity, and deluge it in blood.

The great principles of our republican institutions cannot be propagated by the sword. This can be done by moral force, and not physical.

If we desire the political regeneration of oppressed nations, we must show them the simplicity, the grandeur, and the freedom of our own government. We must recommend it to the intelligence and virtue of other nations, by its elevated and enlightened action, its purity, its justice, and the protection it affords to all its citizens, and the liberty they enjoy. And if, in this respect, we shall be faithful to the high bequests of our fathers, to ourselves, and to posterity, we shall do more to liberalize other governments, and emancipate their subjects, than could be accomplished by millions of bayonets.

This moral power is what tyrants have most cause to dread. It addresses itself to the thoughts and the judgments of men. No physical force can arrest its progress. Its approaches are unseen, but its consequences are deeply felt. It enters garri- sons most strongly fortified, and operates in the palaces of kings and emperors.

A charge to the Grand Jury.

We should cherish this power as essential to the preservation of our own government; and as the most efficient means of ameliorating the political condition of our race. And this can only be done by a reverence for the laws, and by the exercise of an elevated patriotism.

But if we trample under our feet the laws of our country; if we disregard the faith of treaties, and our citizens engage without restraint in military enterprises, against the peace of other governments, we shall be considered and treated, and justly too, as a nation of pirates.

Punishments, under the law, can only be inflicted through the instrumentality of the judicial department of the government. The federal executive has shown a zeal, worthy of the highest commendation, in his endeavor to check the career of these enemies of social order. He has very properly employed a part of the military force of the country in this service; and he has solemnly warned and admonished these deluded citizens, who seem ready to carry devastation into the neighboring province of a foreign and friendly power. These efforts of the president are in aid of the civil power, which, I trust, will not be found wanting on this, or any other emergency, in the discharge of the great duties which have been devolved upon it by the constitution and laws. But in vain will the civil authority be exerted, unless it shall be aided by the moral force of the country. If the hands of the ministers of justice were not strengthened by public sentiment, how ineffectually would they be raised for the suppression of crime. If the open violator of the law be cherished by society, he may, with impunity, set at defiance the organs of the law. The statute book which contains the catalogue of offences, would then become a dead letter, and would be a standing monument of deeply seated corruption in the public.

A charge to the Grand Jury.

I invoke, in behalf of the tribunals of justice, the moral power of society. I ask it to aid them in suppressing a combination of deluded or abandoned citizens, which imminently threatens the peace and prosperity of the country. And I have no fears, that when public attention shall be roused on this deeply important subject; when the laws are understood, and the duties of the government; and when the danger is seen, and properly appreciated, there will be an expression so potent, from an enlightened and patriotic people, as to suppress all combinations in violation of the laws, and which threaten the peace of the country.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1839.

HASBROOK AND SEAMAN v. PALMER AND CLARK.

A note executed in Michigan, payable in New York, in New York funds, or their equivalent, is not negotiable, within the statute.

To bring a note within the statute it must be payable in money, and not in stocks, funds, or current paper.

And it must be for a sum certain, subject to no conditions.

What shall constitute New York funds, within the contract, is not clear.

And what shall be held to be equivalent to New York funds, within the contract, is still less clear.

Messrs. *Williams* and *Ten Eyck* appeared for the plaintiffs, and Mr. *Frazer* for the defendants.

OPINION OF THE COURT.

THIS action is brought by the plaintiffs as assignees on a promissory note, payable at New York, in New York funds, or their equivalent. The defendants demur specially; and for cause of demurrer state, that it is not averred in said declaration of what value the said New York funds or their equivalent in the declaration were at the time and place of payment, and that said note is not negotiable.

The Michigan statute in regard to the negotiability of promissory notes, is similar to the statute of Anne, which has been generally adopted in this country. And the principal question under this demurrer is, whether the note, on which this action

is brought, being payable in New York funds or their equivalent, is negotiable.

The plaintiffs rely on the decision in the case of *Keith v. Jones*, 9 John. Rep. 120, where it was held, that a note payable to A, or bearer, in "New York state bills, or specie," was negotiable within the statute, upon the ground that the bills mentioned meant bank paper, which, in conformity with general usage and understanding, are regarded as cash; and, therefore, that the meaning was the same as if payable in lawful current money of the state. And, also, on the case of *Judah v. Harris*, 19 John. Rep. 144, where it was decided that a promissory note, payable at a particular place, in the bank notes current in the city of New York, was negotiable within the statute.

And it is insisted that the promise to pay in New York funds, or their equivalent, is equivalent to an undertaking to pay in lawful current money of the state of New York. That it is generally understood New York funds means specie, or a currency equal to specie, and that the drawer of the note promises, substantially, to pay in current New York money.

In support of the demurrer it is contended that to be negotiable a note must be for the payment of money only, and this is laid down in *Chitty on Bills*, (edt. 1839,) 152. He says, it is the first and principal requisite, and is established by foreign as well as English law, that a bill or note must be for the payment of money only. That it cannot be for the delivery or payment of merchandize, or other things in their nature susceptible of deterioration and loss and variation in value; nor can it be for payment in good East India bonds, or for the payment of money by a bill or note. *Clarke v. Percival*, 2 Bar. & Adol. 660. Bul. N. P. 272.

A promissory note not payable in cash, or specific articles, is not negotiable. *Matthews v. Haughton*, 2 Fairf. 377. *Johnson v. Latrd*, 3 Blackf. Rep. 153.

Hastcock and Seaman v. Palmer and Clark.

A note payable to A B, or order, in good merchantable whiskey, at trade price, cannot be sued by an assignee, or bearer, in his own name. *Rhodes v. Lindley*, Ohio Rep. condensed, 465.

A note for a certain sum, payable to A, or order, "in foreign bills," (meaning thereby bills of country banks) has been held not to be a good promissory note within the statute, and consequently not negotiable. *Jones v. Sales*, 4 Mass. Rep. 245. In the case of *Lieber and Colsin v. Goodrich*, 5 Cowen Rep. 186, the court held, a note payable in Pennsylvania or New York paper currency is not a promissory note for the payment of money, within the statute. And in the case of *McCormick v. Trotter*, 10 Serg. & Raw. Rep. 94, the court decided that a promissory note payable to A B, or order, for five hundred dollars, in notes of the chartered banks in Pennsylvania, was not a negotiable note on which the indorsee can sue in his own name.

In South Carolina it has been decided that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the statute of Anne and their act; and on a verdict for the assignee of such a note, judgment was arrested. *Large v. Kohne*, 1 McCord 115. *McElarin v. Nesbit*, 2 Nott & McCord Rep. 519.

The cases cited in the 9th and 10th of John. Rep. seem not to be sustained by the current of decisions in this country and in England; and it is difficult to distinguish those cases from the decisions cited, so as to maintain their consistency. If this, indeed, were practicable, it is not necessary to the decision of the question raised by this demurrer.

What is understood in this state by New York funds, or their equivalent, may be a matter of doubt; nor does it seem to be of a nature which can be resolved by evidence, so far as regards the question under consideration.

The term New York funds it is presumed, may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. But whether it is meant the funds of the state generally, or of the city of New York, is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what constitutes New York funds, the face of the note is indefinite. It is, indeed, susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute. It is not a note, in the language of the decisions, payable in money. It is payable in New York funds, or their equivalent.

Now what is equivalent to New York funds? The answer is their value; their value in specie or in current paper which passes at a discount. Might not the drawer pay this note in this description of paper, making up the discount? Would not this, in the language of the contract, be equivalent to New York funds? It would be equivalent if of equal value.

The demurrer must be sustained.

The United States v. Josiah Pearce.

THE UNITED STATES v. JOSIAH PEARCE.

A Postmaster, until the action of the Postmaster General, does not vacate his office by remaining out of the neighborhood of the office.

If he keep the office by an assistant he is still responsible to the department and to individuals.

The 21st section of the postoffice law which prescribes a punishment for the detention of a letter or packet, refers to a letter or packet detained, before it reaches the place of destination.

The stealing or taking a letter, &c., as expressed in the same clause, in the 22d section, means a clandestine taking—not a taking through mistake, or with an innocent intent. It must be a taking with a criminal intent.

The District Attorney appeared for the plaintiffs, and for the defendant.

OPINION OF THE COURT.

THIS was an indictment under the postoffice law. It contained two counts as follows: "That the defendant was employed in the postoffice department of the United States, as an assistant to Lemuel Brown, the postmaster of the United States at the said township of Shiawassee, and did then and there unlawfully and forcibly detain from the said Lemuel Brown, postmaster, as aforesaid, two packages of letters with which he, the said Josiah Pearce, was then and there intrusted, as such assistant to the said Lemuel Brown, postmaster, as aforesaid, against the peace," &c.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Josiah Pearce, to wit: on the 25th day of January, 1839, at the said township of Shiawassee, in the district aforesaid, unlawfully, fraudulently and deceitfully, did take from the mail of the United States three packages of letters, against the peace," &c.

It was proved that Lemuel Brown was postmaster, and being about to leave the neighborhood for some months, he ap-

pointed Pearce, the defendant, assistant, the person who had acted as assistant in the office being unwell. After an absence of about three months Brown returned, and finding that the defendant had removed the office to his own house, and that there was complaint respecting the removal, he called on the defendant, at his house, in company with his former assistant whose appointment had not been revoked, and informed the defendant that he would relieve him from any further care of the office, and would take the papers, &c. Certain letters directed to the postmaster, received in his absence, and others received by the last mail, and the dead letters, were handed to him; but the defendant refused to deliver the other letters, or pay over the money he had received for postage, and seizing a gun threatened to shoot the postmaster if he did not leave the house.

The postmaster retired, and left the letters he had received with his former assistant, with instructions to act as his assistant. He did so, and handed out the letters in his possession as they were called for. The postmaster boarded at the house, with the assistant, at which the office was kept.

In the course of two or three days after this, the defendant made oath before a justice of the peace that certain property had been stolen or fraudulently taken from him, specifying certain letters, &c., which were legally in his possession; on which a search warrant was issued, and the letters in the possession of the regular assistant taken from him, and he was arrested and taken before a justice of the peace. On examination the assistant was released, but the letters were delivered over by the justice to the defendant, who continued for some days to open the mail and hand out letters, claiming a right so to act by virtue of his appointment.

The postmaster then applied to the authority of the United States, instituted a prosecution against the defendant, and,

through the instrumentality of the marshal, obtained possession of the postoffice, letters and papers.

The defendant offered evidence to prove that the postmaster had agreed to resign the office in his favor; that he had sold him the case in which the letters were deposited; that he had removed from Shiawassee, and, consequently, had, under the law and instructions of the department, vacated the office. And in support of this last position the postoffice act was read, which provides that no person shall hold the office of postmaster who does not reside at the place where the office is kept.

But the Court held that this provision was directory to the postmaster general, and, indeed, was imperative on him; but that until he acted, the postmaster and his sureties were responsible to the department, and to individuals who should be injured by any neglect of duty in the office. That if the postmaster had intended to remove, about which fact there was contradictory evidence, the weight of the evidence being decidedly against the allegation that he had removed, it could constitute no justification to the defendant.

The evidence being closed the District Attorney claimed a conviction of the defendant under that part of the 22d section of the postoffice act of 1825, which provides, that "if any person shall steal the mail, or shall steal, or take from, or out of, any mail, or from, or out of, any postoffice, any letter or packet therefrom, or from any postoffice, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy, any such mail, letter or packet, the same containing any article of value, &c., shall, on conviction thereof, be imprisoned not less than two, nor exceeding ten years." And it is insisted that a conviction should be had, also, under the 21st section, for the detention of letters, on the first count in the indictment.

The 21st section provides, that "if any person employed in any of the departments of the postoffice establishment, shall

unlawfully detain, or open, any letter, packet or mail of letters, with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post," he shall, on conviction thereof, be punished, &c.

The evidence does not show that the defendant detained any letters which came into his possession, "and which were intended to be forwarded by mail;" and it is the detention of such letters that is punishable under this clause of the statute. It applies to letters in transitu, and which have not reached their place of destination; letters deposited in a post-office to be forwarded, or handed to a mail carrier on his route, between postoffices, come within the provision if fraudulently detained.

As there is no evidence against the defendant, showing the detention of such letters, he cannot be convicted on the first count in the indictment. More difficulty arises in giving a construction to the 22d section as applying to the facts proved.

The language of the act is, if any person shall steal, or take from any mail or postoffice a letter, &c., shall be punished, &c.

Now to give a literal construction to this language, the taking from the mail, or a postoffice, a letter, is punishable the same as for stealing it. This could not have been the intention of the Legislature. A mere taking may be an innocent act, as if done through mistake, or, without any criminal intent; and we find in the latter part of the same section that, if any person shall take any letter or packet not containing any article of value, out of a postoffice, a very different punishment is inflicted.

It could not have been the intention of the Legislature to provide different penalties for the same act; and, consequently, the taking in the part of the section first cited, must either be

limited to letters containing some article of value, or to a felonious taking.

The taking of a letter which contains an article of value, is limited in this section to a taking with or without the consent of the person having the custody thereof, and where such letter is embezzled or destroyed. This provision does not embrace the class of offences provided for in the previous part of the section, which is stealing or taking.

The design of the taking is shown by the embezzlement or destruction of the letter. But is a simple taking, without a felonious intent, punishable the same as for stealing? We think, when the statute is taken together, and its object and scope are considered, that such a construction cannot be sustained. To come within this provision of the statute, the taking must not only be unlawful but felonious; it must be a clandestine taking—such as would amount to larceny of personal property.

This construction is not only justified by a different punishment being provided in the same section, for taking a letter from a postoffice, but by the first taking being placed in the same class and punished as for the stealing or the embezzlement of a letter.

The conduct of the defendant was highly reprehensible in refusing to surrender the office, on the demand of the postmaster; and still more so on his obtaining possession of the letters delivered to the postmaster, under the forms of law. This proceeding was an aggravation of his offence, and can only be palliated, in any degree, by the ignorance of those who were engaged in it. It was a prostitution of the forms of law to attain an illegal object. But unless the defendant in taking the steps he did take had a criminal intent, he is not guilty under the above section. If he was honestly engaged in the prosecution of what he supposed to be a right, and his whole

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conduct evinced nothing more than a disposition to hold the office and fairly to discharge its duties, he was not guilty of a felonious taking within the meaning of the statute.

It is the intent, in all instances, which constitutes the crime, and which is ascertained by the acts of the offender. In many instances the act itself being a crime of great enormity, the whole burden of proving an innocent intent is devolved on the party accused. In this case enough appears in the evidence to show that the defendant did not intend to steal the mail, or any letters or packets from the postoffice. Of this, however, the jury can judge.

Verdict not guilty.

ROBERT S. SHERMAN v. HORACE H. COMSTOCK.

An averment in the declaration that A B, by C D, made a certain bill, or check, is sufficient.

The holder of a check must give notice to the drawer, if payment by the bank be refused. And a declaration on such an instrument is defective, if notice be not averred.

Messrs. *Atterbery* and *Pitts* appeared for the plaintiff, and Mr. *Howard* for the defendant.

OPINION OF THE COURT.

THE first count in the declaration states that, on the 14th of December, 1838, the defendant made his certain note, or check, in writing, in the words and figures following:

“Detroit, 14th December, 1838. Cashier of the Michigan State Bank, pay to Morgan and Clark, or bearer, \$674 96, thirty days from date. Signed, Horace H. Comstock, by Joel Clemens.”

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And then and there delivered said note or check, to said plaintiff, for value received. And said plaintiff, in fact, saith, that afterwards, and when said note or check, became due, and payable, according to the tenor and effect thereof, the same was presented and shown to said Michigan Bank, and was not paid, &c.

To this count, the defendant demurred, and for cause of demurrer, states;

First: Because it does not appear in the declaration that the said Clemens was authorised to act as the agent of the said defendant, in making said note or draft. And,

Second: That it is not averred that the defendant had notice of the dishonor of the said note or check.

As it regards the execution of the note by the defendant, it is sufficiently averred in the declaration. He signed it by Joel Clemens; and that Clemens was authorised to act in the premises appears; for, that his act is alledged to be the act of his principal. The declaration might have contained an averment that Clemens was duly authorised to act as the attorney in fact of the defendant, but such an averment is unnecessary. 8 Wheat. 642. Bayley on Bills 103; 2 Phillips' Ev. 4, 6.

And, as it respects the second ground of demurrer, a notice of nonpayment is considered indispensable. This instrument is in form and substance a bill of exchange. There is a drawer and a drawee, and the holder of the bill, who is bound to present it at maturity, and give notice of nonpayment to the drawer. There is the same reason to require notice in this case as in any other; and it is essential that the declaration should contain an averment of notice. On this ground the demurrer is sustained.

The plaintiff then moved for leave to amend his declaration, which was granted, on payment of costs.

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GEORGE W. LEWIS v. WILLIAM BREWSTER.

A guarantor is entitled to notice of the dishonor of certain notes, the payment of which he had guaranteed.

The undertaking is collateral, and in all such cases, a notice is indispensable.

And as a notice is necessary to give the right of action against the guarantor, the declaration must aver that it was given.

An averment that notice was given to the guarantor, more than seven months after the last note became due, and nearly a year after the first one was payable, held to be bad on demurrer.

When there is an excuse for the want of notice, it should be stated in the declaration.

If the payee be insolvent at the time the note became payable, a notice to the guarantor need not be given.

Mr. *Frazer* appeared for the plaintiff, and Messrs. *Bates*, *Talbott* and *Romeyn* for the defendant.

OPINION OF THE COURT.

To the four special counts in the declaration, the defendant demurs, and takes issue on the common counts.

The questions in the case arise on the demurrer, and there are some objections as to the manner in which the instrument is set out; but as the main point appears in the declaration, it is proper to advert to the obligation on which the action is founded. It is as follows:

"July 27, 1838. I do hereby guaranty the eventual payment to George W. Lewis, of Boston, Mass., of the following named notes or obligations, given by Mead, Kellogg & Co., to the order of said Lewis, and payable at the Commercial Bank in the city of New York; viz: One note for \$1,666 55, due two months from date; one note for \$1,666 39, due three months from date; one note for \$1,686 34, due four months from date; one note for \$1,689 37, due five months after date; one note for \$1,722 30, due six months from date, which said notes are given by said Mead, Kellogg & Co., to said Lewis, in payment for his account against them, which account is this

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day settled in full, as above. The above is done for a valuable consideration." Signed "William Brewster."

It is objected to the first count, that it does not set forth a consideration for the undertaking of the defendant. But this objection seems not to be well founded.

In the first count, it is alledged that, in consideration, the plaintiff, at the special request of the defendant, would sell and deliver to Mead, Kellogg & Co., merchandize to the amount of eight thousand and forty dollars and ninety five cents; the defendant promised, whether in writing or not, does not appear, to guaranty the payment of certain notes to be given by the purchasers, for the same. And the plaintiff avers, that the merchandize was sold, the notes taken on the 27th July, 1838, and that on the same day the defendant, in writing, guarantied the eventual payment of the same.

Now it sufficiently appears in the declaration, that the merchandize was sold on the promise to guaranty the payment of the notes to be given, and that the guaranty was executed, in pursuance of this promise. Here was a confidence and trust reposed in the defendant, which induced the plaintiff to sell the goods, and this constitutes a consideration for the guaranty.

But it is alledged that the promise to guaranty the notes, not being in writing, was void, and that the declaration does not show that the defendant had notice of the acceptance of his guaranty. And the cases in 7 Peters 113, and 12 Peters 497, are referred to.

These cases, however, as it regards the notice of the acceptance of the guaranty, are not analagous to the present one. This is a guaranty of the payment of certain notes specified, and, of course, is a recognition of the obligation of the original promise. It admits every legal requisite necessary to give effect to the obligation. Under the written guaranty now before us, there could be no notice of acceptance, for the execution of the instrument shows an acceptance.

That there must be a consideration to make a guaranty obligatory, is admitted. But this consideration is generally found in the credit given to the guarantor, which induced the vendor to part with his property.

If it be admitted that the guarantor was not discharged from his promise, it is contended the count is defective in not averring that the guaranty was in consideration of this liability. 4 John. 280. That the guaranty was given in consideration of the sale of the goods on the promise of the guarantor to be responsible, though not in terms averred, sufficiently appears from the facts stated in the first count. A special averment of this fact would have been more technical, and more, perhaps, in conformity to the correct rules of pleading; but it would not have given greater point or certainty to the count.

That the holder of the notes was bound to use diligence, is a doctrine well established; but it is not necessary to consider this point in reference to the commencement of suits on the notes, and the proper averments in relation to the same, which it is contended are not to be found, either in the first or the second, third and fourth counts. We will come at once to the great question in the case, which is—whether the holder of the notes was bound to give notice to the guarantor of their dishonor; and if this shall be resolved in the affirmative, whether the declaration should contain an averment that notice was given.

This description of obligation is common in commercial transactions; and the principles which govern it, have often come under judicial cognizance.

On the part of the plaintiff, it is contended that no notice was necessary, and that it is matter of defence for the defendant to show the damages he has sustained for want of notice. And, to sustain this position, 2 Hall's Rep. 199; 9 East. 348; 1 Holts. N. P. Rep. 153; 3 Moore's Rep. 15; 6 Moore's 521; 3

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Brod. & Bing. 211; 1 Bing. Rep. 216; 2 Camp. 436; 10 Peters 482, are cited.

These are cases in which a notice to the guarantor need not be given, as where the drawer of the note guaranteed, is insolvent when it becomes payable; and in such a case it is matter of defence for the defendant to show that he has suffered damage for want of notice. It is a well established rule, that the same degree of strictness in regard to giving notice to a guarantor is not necessary to charge him, as to charge an indorser; and there are English authorities which favor the position taken by the plaintiff, that the inquiry is, whether the guarantor has been injured by want of notice. But the weight of authority in the English books is against the position assumed; and in this view the American authorities are still stronger.

The undertaking of the guarantor is collateral, as much so as that of the indorser of a bill; and the reason for a notice to him, is as strong as to an indorser. And if commercial convenience has dispensed with the same strictness in the former, as in the latter, it still requires a reasonable notice. It is as necessary that the guarantor should endeavor to obtain an indemnity from his principal as an indorser; and it is on this ground that a notice is as indispensable in the one case as the other.

In the case of *Reynolds et al., v. Douglass et al.*, 12 Peters 498, the court say: "In this part of the record, the question is fairly raised, whether the insolvency of Haring, prior to, or at the time of payment, will excuse the plaintiffs from making a demand on him, and giving notice to the guarantors." And after referring to 9 Serg. & Rawle 198; 1 Barn. & Cres. 10; 8 East. 242; 3 Kent's Com. 123; 2 Taunt. 206; 5 M. & S. 62; 3 Barn. & Cres. 439, the court remark, "the rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity."

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And again, in their opinion, the court say, in reference to the charge of the Circuit Court to the jury, "in their fifth and last instruction, the court charge the jury, that, to enable the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment, notice should have been given in a reasonable time, to the defendants; and on failure of such proof, the defendants are in law discharged." "This instruction, the court remark, rests upon the necessity of a personal demand of Haring, by the plaintiffs. It has been already shown, that this demand was unnecessary, in case of Haring's insolvency."

From this opinion, it is clear that the court considered a notice to the guarantor, of the dishonor of the note guaranteed, indispensable, except in case of insolvency. But that where an insolvency at the maturity of the note, is established, neither a demand nor notice is necessary.

The same doctrine is laid down in the cases of the *Oxford Bank v. Haynes*, 8 Pick. 423. *Garrow v. Gills*, 9 Serg. & Rawle 202. *Green v. Dodge and Cogswell*, 2 Ohio Rep. 498. *Grice v. Ricks*, 3 Dev. Ala. R. E. 2. *Douglass et al., v. Reynolds et al.*, 7 Peters 113.

There are some apparently contradictory decisions to those in the New York and other reports; but on a strict examination, they will be found, in general, to affirm the same principle. Where the guarantor has been held liable, without notice, it has been where the maker of the note guaranteed was insolvent, when it became payable, or on account of a liability growing out of the original transaction.

The undertaking of the guarantor in the present case, was, not to pay absolutely or unconditionally, but to pay eventually; that is, if payment could not be obtained of the drawers. His undertaking was then conditional, and a notice of the happen-

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ing of the condition which was to make his obligation absolute, was necessary; and this we consider is the well established doctrine, sanctioned by the Supreme Court.

If the parties who ought primarily to have paid the bill or note, were solvent at the time the same became due, and for some time afterwards, and only subsequently became insolvent, before notice or inference of actual damage from the want of notice to the party guaranteeing, or otherwise collaterally liable, will prevail, until rebutted by actual proof, that if notice had been given, payment would not have been obtained. *Chitt. on Bills*, (ed. 1839,) 474. *Phillips v. Astling*, 2 Taunt. 206. *Holbrow v. Wilkins*, 1 Barn. & Cress. 10. *Bridge v. Berry*, 3 Taunt. 130. *Bishop v. Rowe*, 3 Maul. & Selw. 362. *Casy v. Scott*, 3 B. & A. 619.

If this notice was essential to fix the responsibility of the guarantor, was it necessary to aver it in the declaration specially; or, is the general averment in the counts demurred to sufficient?

Every thing necessary to give the plaintiff a right of action, must appear in the declaration; and a notice being indispensable to this right, must, of course, be averred. The omission of an averment of notice, when necessary, will be fatal on demurrer, or judgment by default. *Cro. Jac.* 432. This defect may be avoided by a verdict, except against the drawer of a bill. 1 *Strange* 214; 1 *Saund.* 228, *a.*; 4 *Bian.* 108; 7 *Sergt. & Rawle* 310. But a general averment in a declaration on a bill of exchange, "of all which the said promises the defendants had afterwards, &c., had notice," is sufficient. 3 *John.* 207.

The general averment in this case, is the same in all the counts, and is, "of all which the said defendant, on the second September, 1839, at Detroit, had notice." This notice, as averred, was more than seven months after the last note became

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payable, and was, in fact about the time this suit was commenced.

Had the averment been, "of which premises, the defendant had due notice," it might have been held sufficient, as, under such an averment, the fact of the notice, and the circumstances under which it was given, would be matter of evidence. But the notice averred is special, as to the time it was given, which was near a year after the first note became due; and, as before remarked, more than seven months after the last one was payable; and no excuse is alledged why it was not given before.

There are circumstances which will excuse the want of notice, and these should always be stated in the declaration. Chitt. on Bills 212, 319; 1 Salk. 214; Vin. Ab., title, Notice, A. 2.

If a notice be necessary it must appear in the declaration to have been given in due time, or the excuse for not giving it must be stated. The averment of a notice after the lapse of so long a period, unaccompanied by an excuse for the delay, does not show the diligence which the law requires. It is, in fact, nothing more than the general averment of notice, which refers to the commencement of the suit, and is used in some cases more as a matter of form than substance.

In this respect we think the declaration is defective; and without examining the other points made in the argument, in support of the demurrer, we sustain it, on this ground.

Leave given to amend declaration.

William A. Whitehead v. D. Jones.

WILLIAM A. WHITEHEAD vs. D. JONES.

The indorsement of a clerk, in the office of a notary, on the protest of a note for nonpayment, that notice was duly served, is not evidence.

The deposition of the clerk should have been taken.

The usages of an office, as it regards the service of a notice, cannot make that evidence which is in itself not so.

OPINION OF THE COURT.

This action is brought against the defendant as indorser, on a promissory note for the payment of one thousand dollars, at the Michigan State Bank. When the note became due it was proved, by the protest and statement of the notary, that, at maturity, it was presented to the bank, and payment demanded, but the note was not paid.

The notary stated, it appeared from an indorsement on the protest, that regular notice was given to the indorser. That it was the uniform practice of his office to serve a personal notice, where the indorser lived in the city, or leave it at his residence or place of business. But he had no knowledge of notice being given in this case. The indorsement was made by one of his clerks, who gave the notice, he presumes, but who has left the State.

The plaintiff, also, proved that the defendant, in conversations respecting the note frequently, stated no objections to the payment of it, except that it was usurious.

This evidence is clearly insufficient to charge the indorser. There was no admission, or waiver, on his part, of the notice; and there is no evidence that it was served.

The indorsement of the clerk, on the protest, (he being living,) that due notice was given, does not prove the fact. Nor, under the circumstances, can the usages of the office, as stated by the notary, supply the defect. The deposition of the clerk,

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who is supposed to have served the notice, should have been taken. The indorser is not chargeable, except on strictly legal principles; and these principles cannot be relaxed.

The plaintiff suffered a nonsuit.

THOMAS A. DAVIS vs. CHARLES H. ABBOTT AND SEDURCY M. LAYTON.

Where a note was given by Abbott and Layton, it is unnecessary, in the declaration, to aver a partnership.

The instrument shows a joint liability; and the declaration states the names of the defendants in full, and alleges that they, by the name and description of Abbott and Layton, executed the note. This, though not very technical, is sufficient.

OPINION OF THE COURT.

This action is founded upon a promissory note. The declaration states, that on the 22d October, 1838, the defendants, by the name and description of Abbott and Layton, made and signed their promissory note for the payment of six hundred sixty nine dollars and thirty two cents, &c.

The defendants demurred to this count in the declaration, and for cause of demurrer stated, that in the count it is averred the defendants made the note in the name and description of Abbott and Layton, without stating a partnership, &c.

The averment of a partnership, where the instrument, on which the action is founded, shows a joint liability, is unnecessary. The defendants assumed the name of Abbott and Layton; and the declaration avers that the note was thus executed by them; and if the proof shall sustain this averment, it will show a right of recovery in the plaintiff.

Campbell and Emerson v. Emerson and Moore.

The suit is not brought against Abbott and Layton without any further designation, but the christian names of the defendants are stated, and the averment is, that these persons, so named, gave the instrument in the name and description of Abbott and Layton. This averment, we think, is sufficient. It may not be very technical, but it leads to no uncertainty, and is substantially good. Why need a partnership be alledged when the instrument shows it, and the declaration, also, states the names of the defendants in full?

Whether a partnership could be proved, under this averment, and then that one of the partners signed the name of the firm, does not arise, because, the proof offered is, that both defendants acknowledged that the signatures to the note were their own proper signatures.

The demurrer to the first count is overruled.

CAMPBELL AND EMERSON vs. EMERSON AND MOORE.

A suit having been commenced in the Circuit Court of the United States is not abated by a subsequent suit, in the State Court, by attachment, against the defendant, in the first suit, who is summoned as garnishee.

Jurisdiction having vested in the Circuit Court, it cannot be divested, by any subsequent proceeding, in a State Court.

Messrs. *Williams* and *Ten Eyck*, appeared for the plaintiffs, and Mr. *Romeyn*, for the defendants.

OPINION OF THE COURT.

This action is brought on a promissory note for the payment of money. The defendants pleaded in abatement that, on the 7th October, instant, a certain suit, in attachment, in favor of

certain persons by the names of Southgate, Blake, and Adams, against Emerson, one of the plaintiffs in this suit, and that the defendant, Emerson, and said Moore, were summoned as garnishees, &c.

To this plea the plaintiffs demurred, and assigned for cause, that this action, and the suit in attachment, are different. That the causes of action are different, and that the suit, in attachment, was commenced long after the institution of this suit, &c.

In support of the demurrer, the plaintiff cites Jac. Law Dictionary, title, Abatement, 1, 4, where it is said, it is a good plea in abatement, that another action is pending for the same cause; but it must clearly appear that both actions are brought for the same thing. And, also, Gould's Plead., chap. 5, 283, 284, where another suit is pleaded in abatement of the one in which the plea is filed, it must appear that the action or suit, which is pleaded in abatement, was a prior suit pending between the same parties, and for the same cause. 1 Wheat. 215.

In support of the plea, the Revised Statutes of Michigan, page 508, sec. 8, are referred to, where it is enacted, "that the garnishee, from the time of receiving notice of the attachment, shall stand liable to the plaintiff in attachment, in the amount of the property, money and credits in hand, or due from him to the defendant." And it is contended, as the notes, on which the defendant is sued in this court, are credits of the plaintiffs in those suits, that they are bound in the hands of the garnishee. This being so, the attachment is a good plea in abatement; otherwise, if the defendant should pay the debt to the present plaintiffs, he might be compelled to pay it a second time to the plaintiff in attachment. That the proceedings are pending in different courts cannot impair the principle.

That the attachment is a proceeding in rem, creating a lien upon the debt, and binding upon the defendants in their suits.

It is insisted that these principles are settled in the case of *Embree and Collens v. Hanna*, 6 John. 103, and the cases there cited. Also, in the case of *McDaniel v. Hughes*, 3 East. 367.

In answer to the objection, that the attachment was commenced subsequent to this suit, the case of *Holmes v. Remson*, 20 John. 229, is cited.

We have not before us the Statute of New York, which regulates proceedings by attachment, but it is presumed to contain provisions which are not found in the Michigan Statute. The institution of a suit by attachment, unless under some peculiar provision of the statute, could not supersede a suit previously commenced, and, consequently, cannot be pleaded in abatement. The attachment is used as a means to bring an absent or absconding debtor into court. If he enter his appearance, and give special bail, the attachment is discharged, and the suit proceeds as though the first process had been served on the defendant.

In this case the jurisdiction had attached in this court before the proceeding, by attachment, was instituted in the State Court. And the question is raised, whether this subsequent proceeding shall oust the jurisdiction previously vested.

It would seem to be contrary to all principle, that a creditor, by issuing an attachment, should take from the custody of the Court an instrument on which a suit had been previously commenced. It is the province of a Court of Chancery to enjoin the proceedings in a case at law; but chancery interferes only on the ground that there is not adequate relief at law.

The attachment creates a lien on the property attached, and if the suit be prosecuted successfully, and under the statute,

other creditors are permitted to exhibit their claims; it might be necessary for such creditors to do so, whether they claim under a judgment, or in any other way. But, in such case, there is no collision of jurisdiction. In certain cases the judgment creditor may come in under the attachment; but the proceedings, on the attachment, ought not to, and cannot, prevent the plaintiff, in the first suit, from prosecuting his claim to final judgment. He has selected the tribunal in which to prosecute his suit, and he has a right to the judgment of such tribunal. If the plea in this case was sustained, it would not be difficult, in many cases, to oust the jurisdiction of the Courts of the United States, by issuing attachments in the State Court. This would be taking from a nonresident of the State a right to sue in this Court, which is given to him by the Constitution of the United States, and an express act of Congress. And in this view, the case is different from the case of *Holmes v. Remson*, in 20 Johnson.

Had the attachment been levied before the commencement of this suit, there can be no doubt it might have been pleaded in abatement. In all such cases the suit first commenced can not be abated by pleading a subsequent suit embracing the same subject matter.

This question was fully considered, and decided, at the last term of the Supreme Court, in the case of *Wallace v. McConnell*, 13 Peter's, 152. That case arose on facts similar to the case now under examination, and the principle was the same. And the Court, in that case, decided that a subsequent suit, by attachment, where the debtor was summoned as garnishee, did not affect the jurisdiction of the Circuit Court of the United States. This is conclusive of the present case. When suit is commenced, the instrument, on which it is founded, is in the custody of the law, and cannot be withdrawn from such cus-

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tody. And, especially, it can not be withdrawn by the commencement of a suit, subsequently, at law.

The demurrer to the plea is sustained. Judgment for the plaintiffs.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1839.

HENRY STANLEY vs. EMOR WHIPPLE.

To entitle an individual to an exclusive right, under the patent law, his invention must be substantially different from any machine or thing in use.

A patent is void where, in his specifications, the patentee claims more than he has invented.

Under the patent law of 1836, a patent which contains corrected specifications, has relation back, and, for all legal purposes, covers the whole time, from the emanation of the first patent, which, for defective specifications, had been declared void.

In such case a contract to sell the right is made good by the second patent.

A patent, to be valid, must be of some utility.

The books of a party are not evidence, unless made so by a call to produce them, &c.

A verdict will not be set aside where the evidence conflicts. It was for the jury to weigh the evidence. A declaration must contain a statement of facts, which, in law, gives the plaintiff a right to recover.

This is the question to be answered on a demurrer. But after verdict, defects, in substance, are cured, if, from the issue in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial.

Where a contract binds the defendant to pay five dollars for each stove sold, as in this case, the special contract need not be declared on; the amount received may be recovered on the general count for money had and received.

Mr. *Chase* appeared for the plaintiff, and Messrs. *Storer and Eells* for the defendant.

OPINION OF THE COURT.

The defendant's counsel moved the Court for a new trial, on the following grounds:

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First: That the verdict of the jury is against law and evidence;

Second: The damages given by the verdict are excessive;

Third: Because the Court erred in its instruction to the jury to exclude the evidence from the defendant's books;

Fourth: Because the Court erred in its instruction to the jury, that the second patent, if valid, had relation back to the time when the first patent was obtained.

The Court will consider the first and fourth grounds in connection.

The contract, on which this action is brought, is dated the 3d of October, 1832, in which Stanley agrees to sell to the defendant the right of making and vending a stove, for which he claims a patent (which patent is not yet obtained) in the city of Cincinnati, Ohio, &c., for which the defendant agrees to pay five dollars for each stove that he shall make and sell, &c.

The plaintiff, after proving the contract, and giving it in evidence, introduced his patent, dated the 28th November, 1836.

This patent is objected to on the ground, that its date is long subsequent to the date of the contract; and, it is contended, that it does not make good the right of the plaintiff from the time he originally applied for a patent and obtained one, which proved to be inoperative and void.

It appears the first patent of the plaintiff, for his invention was obtained the 17th December, 1832; and which was declared to be void and inoperative by the Circuit Court of the United States, for the southern district of New York, on the ground that the specifications claimed more than the patentee had invented. And, particularly, that he claimed, as his invention, a rotary top, &c., which was in use before he set up any right to it.

The plaintiff, after this decision, obtained another patent, on different specifications, dated as above.

It is insisted that the specifications of the second patent are defective; and that the plaintiff cannot sustain an exclusive right under it.

The Court think that, on this ground, the second patent is not objectionable.

The specifications show clearly what parts of the stove the patentee claims to have invented; and the stove is so clearly described, in its structure, as to enable a person, possessing ordinary skill in the construction of stoves, to build one; and this is all the certainty which the law requires.

Under the thirteenth section of the patent law, passed the 4th July, 1836, the second patent has relation back to the emanation of the first patent, as fully for every legal purpose, as to causes subsequently accruing, as if the second patent had been issued at the date of the first one.

It is under this patent, then, that the right of the plaintiff must be examined.

In the defence it is strongly insisted, that the contract was made with a reference to the stove for which the first patent was obtained, and that the specifications used in the first patent, were supposed, by the defendant, to be the improvements of the plaintiff, and constituted the consideration of the contract; and that, as these specifications were limited to the parts of the stove invented by the plaintiff, by reason of which the first patent was void, there was a failure of the consideration of the contract.

The contract was respecting "a stove for which the plaintiff claims a patent." There was no description of the constituent parts of the stove, or of the parts which the plaintiff claimed as his invention, in the contract.

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Whatever remarks may have been made by either of the parties, while negotiating respecting the contract, it is very clear that such remarks cannot be given in evidence. The contract was reduced to writing, and there is nothing ambiguous on its face; the parties, therefore, cannot, by parol evidence, change, in any respect, the clear import of the written agreement.

The defendant, in his advertisements respecting the stove, calls it "Stanley's patent stove."

The second patent legalizes the rights of the patentee, from the date of the first patent; and, if this effect be given to it, it must sustain the contract made in this case. Stanley having an exclusive right, could convey it in whole, or in part. And it must be immaterial to the defendant whether the right of the plaintiff was made good by the first patent, or, by relation, under the second patent.

It appears a stove was invented by Towns and Gould, in 1824, which had a rotary top, but it seems not to have had any of the improvements which the plaintiff claims to have invented in his second specifications. Nor is it proved that there was any stove in use, prior to that of the plaintiff's, with a rotary top, moved by a cog and pinion, and put in motion by a crank; or which contained a combination of parts, or application of principles, similar to those in the plaintiff's second and corrected specifications.

The lever applied on the top part of the stove, which several of the witnesses speak of, as an improvement on Stanley's invention, was subsequently applied; and was done to evade Stanley's patent, as some of the witnesses expressly state. If it was, in the language of the witnesses, an improvement upon Stanley's plan, of course, it must have been subsequent to it.

The jury were instructed that a mere formal difference can not be protected by a patent. That the difference must be

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substantial; and that, if they shall find that a stove was in use prior to the plaintiff's invention, substantially like his, he can claim no exclusive right under his patent.

There was, however, no such evidence before the jury; and, on this part of their verdict, there is no ground of complaint.

But, it is contended, that the invention must be shown to be of some utility; and that, in this respect, the plaintiff has failed.

It was wholly unnecessary for the plaintiff to introduce any evidence to prove that which the defendant so repeatedly and publicly admitted.

In his advertisement of this stove, he speaks of it as one of the most useful inventions; and that, in the parts of the country where it had been introduced, it had superseded all others. And, in addition to this, he states, that he has evidences of the great utility of the stove, from gentlemen of great respectability in our eastern cities; and he publishes the certificates of more than twenty citizens of respectability in Cincinnati to the same effect.

We are satisfied, therefore, that the verdict of the jury should not be set aside on any of the arguments urged, under the first and fourth grounds assigned.

The ground that the Court erred in excluding the copy from the books, as evidence, will be next considered.

The counsel do not contend that the books are, in themselves, evidence; but they insist that the copy from them, attached to the deposition of the book-keeper, which he swears is a true copy, is made evidence by the counsel of the plaintiff.

The counsel for the plaintiff did not call for the books, or ask a single question in regard to their contents. How, then, has he made the books evidence?

He admonished the book-keeper, sometime before his deposition was taken, to be cautious in his statements, as there was some discrepancy in a deposition, or depositions, which he had formerly given on the subject; and the counsel advised him to refresh his memory by a reference to the books.

This does not make the books, or their contents, evidence in this cause; and, consequently, the Court, very properly, excluded the above copy from the jury.

The counsel insist that the damages are excessive, and that, on this ground, a new trial should be granted. The damages assessed by the jury, being fifteen thousand dollars, are large; and it is a subject of regret, that a less sum had not been found. But we must look into the evidence, and see whether the verdict is sustained by it.

The depositions of Snyder, Woodruff, and Roff, go the whole length of the verdict. And although the defendant's witnesses place a lower estimate on the number of stoves sold, yet they do not speak positively; and, if they did, it was the province of the jury to weigh the evidence. Where the evidence sustains the verdict, the Court cannot say that the jury should have given greater weight to other parts of the testimony, which would have limited the damages assessed to a less sum.

This verdict, though large, we cannot say is against evidence, or, that it is not supported by the evidence; and the motion for a new trial is overruled.

A motion, in arrest of judgment, has, also, been made and argued; and the ground is, that the plaintiff does not aver in his declaration that he ever obtained a patent, or had an exclusive right to the stove, which was the subject matter of the contract.

In the first count is stated, in the words of the agreement, that the plaintiff sold to the defendant the right of making and vending a stove, for which he claims a patent (which patent is

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not yet obtained) in the city of Cincinnati, &c., for which the defendant agreed to pay five dollars for each stove that he should make and sell.

The allegations in the second and third counts, are substantially the same. The fourth count is for money had and received. A declaration is a statement of facts, which, in law, gives the plaintiff a right to recover. And, if a demurrer had been filed in this case, the only question would have been, does the statement of facts, in this declaration, give the plaintiff, in law, a right to recover. And we will first consider the question as if raised by demurrer.

Suppose the plaintiff, on the trial, had, after proving the contract, introduced evidence that, at the time the contract was entered into, he did claim a patent right for the stove, and had here closed his evidence. Could he have recovered? If he could not recover on this evidence, can the declaration be sustained? It is materially defective, if, to lay the foundation of a recovery, the proof must go farther than the allegations it contains.

This is, therefore, a safe and sure test of the goodness of the declaration.

The plaintiff, on the trial, did not stop, on showing that he claimed the patent right. This was, in fact, shown by the contract itself. But he gave his patent in evidence, and proved that he not only claimed a patent, but that he had obtained one, which was the evidence of his exclusive right.

The declaration does not aver that a patent had been obtained, nor that the exclusive right was vested in him. And if he did not possess the exclusive right, there was no sufficient consideration to support the contract. It is an instrument not under seal, and does not, on its face, purport a consideration.

We think the declaration is defective in not containing the necessary averments; and if the question had been raised by general demurrer, the objection must have been fatal. But the point is brought to our consideration after verdict, on a motion in arrest of judgment; and it is important to inquire, whether the defect is cured by the verdict.

The statute of jeofaile cures all defects of form, but a verdict often cures matters of substance. This is done by a legal intendment after verdict. Mr. Chitty, 1 vol. Plead. 712, says, that where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts defectively, or imperfectly stated, or omitted, and, without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict. 1 Saund. 228, n. 1.

And again, he remarks, the expression, cured by verdict, signifies that the Court will, after a verdict, presume, or intend, that the particular thing which appears to be defectively, or imperfectly stated, or omitted, in the pleading, was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict, and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved, must always be such as can be implied from the allegations on the record, by fair and reasonable intendment.

In illustration of this rule several cases are referred to, and, among others, one from 2 Bing. 464. The plaintiff in an action of assumpsit stated, that he had retained the defendant, (who was an attorney,) to lay out seven hundred pounds in the purchase of an annuity, and that the defendant promised

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to lay it out securely; that the plaintiff delivered the money to the defendant accordingly, but that the defendant laid it out on a bad and insufficient security. After verdict, it was objected, on a writ of error, that no consideration appeared in the declaration; that it was not averred that the promise was in consideration of the retainer, nor that the retainer was for reward; but the Court held that it was absolutely necessary, under the declaration, that the plaintiff should have proved, at the trial, that he had actually delivered the money to the defendant, and that the latter had engaged to lay it out; that the delivery of the money, for this purpose, was a sufficient consideration to support the promise; and that, although it was not expressly alledged in the declaration, was, in fact, the consideration for the promise, the Court would intend, after verdict, that such was the consideration.

And so in the case under consideration. The declaration does not aver that the plaintiff had obtained a patent, or that the exclusive right was vested in him; but he states that he claimed a patent, and that the defendant possessed and enjoyed the right under the contract; and from these statements, and the issue that was made up, the Court must presume that, on the trial, the exclusive right was proved to be in the plaintiff. The plaintiff's title was defectively set out, and, in such cases, after verdict, the Court will presume that the facts showing the right were proved on the trial. This intendment, we think, is fairly presumed from the allegations on the record.

As, in our opinion, the defect in the declaration is cured by the verdict, it is unnecessary to say any thing on the general count for money had and received. To recover, under that count, it is necessary to show that money has been received; but a jury might well infer the receipt of the money from the fact of the sale of the stoves. And, although the contract was

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special, yet, if it appear to be executed, and not open and subsisting, it is a well settled principle that the plaintiff may recover on the general count, for money had and received.

If the action be brought for a breach of the contract, and it has not been put an end to, by the act of the party, the remedy is on the contract, and not on the general count. In this case the plaintiff claims a right to recover only five dollars for each stove which the defendant has made and sold. He, therefore, goes for the money received, and not for damages for any other violation of the contract.

The motion in arrest of judgment is overruled.

**FINDLAY'S EXECUTORS vs. BANK OF THE UNITED STATES,
SUTHERLAND et al.**

To give jurisdiction, the citizenship of the defendants is as necessary to be stated as that of the complainants.

Where the complainants, being citizens of the state, brought their bill against the Bank of the United States, and certain individuals whose citizenship is not named, the Court cannot take jurisdiction.

A judgment against an accommodation indorser, who is considered as a surety, and, also, the drawer, merges the relation of principal and surety.

In such a case, the only remedy is for the surety to pay the judgment, and ask to be substituted to all the rights of the principal.

A creditor who looks to two funds may be restrained to the use of one, if sufficient, at the instance of a creditor of one of the funds; or, if satisfaction be obtained by the creditor of both funds, out of the common fund, equity will give the other creditor a lien on the fund not exhausted.

A debtor has a right, without the assent of his surety, to convey his property, fairly, in payment of his debts.

And the Court will not set aside such conveyance at the instance of the surety, unless there has been fraud.

Parol evidence not admissible to vary an agreement in writing.

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Mr. *N. Wright* and Mr. *Worthington* appeared for the plaintiffs, and Mr. *Chase* and Mr. *Fox* for defendants.

OPINION OF THE COURT.

THIS bill was filed by the complainants to procure certain credits on certain judgments obtained by the Bank of the United States, against Findlay, in his lifetime, as the surety of Sutherland.

Findlay, and one Thomas Irwin, who some years ago deceased, indorsed three several notes to the Bank of the United States, for Sutherland, on which judgments were entered the 13th July, 1824, for \$5,619 71; the 7th June, 1825, for \$5,330 13; the 23d July, 1828, for \$5,508 75. To secure the payment of these notes a mortgage to the bank was executed by Sutherland, the 25th September 1829; and at December term, 1828, a decree was entered for \$20,623 32, and a sale of the mortgaged premises ordered.

Another mortgage, bearing the same date, was executed by Sutherland to the bank, to secure the payment of four several notes—two of which were indorsed by Joseph Hough. On the two unindorsed notes judgment was entered the 15th July, 1824, for \$2,726 25, and the 23d July, 1827, on one of the other notes for \$4,841 36. On the other note, for \$4,346 00, due 25th August, 1827, no judgment was obtained. A scire facias was issued on this mortgage, and a judgment obtained for \$16,011 00 at July term, 1828.

The judgment for \$5,619 71, against Findlay, Sutherland and Irwin; and that for \$2,726 25, against Sutherland only, were levied 10th November, 1824, on certain real property.

On the 5th November, 1821, John Busenbach obtained a judgment in the court of common pleas, for Butler county, against Sutherland, which was levied 27th October, 1826, on a part of the property covered by the prior levy. The above

judgments against Findlay, were, also, levied on his property the 16th June, 1827.

In the spring of 1829, Findlay and Sutherland frequently solicited the bank to take the property mortgaged and levied upon at certain prices stated; and afterwards, the 29th June, 1829, an agreement, in writing, was made between the bank and Sutherland, by which the latter agreed to convey to the bank the property levied upon, and, also, that covered by the mortgages, for the sum of \$25,794. This sum was produced, probably, by adding to the prices originally talked of, \$1,000 upon a lot in Cincinnati, and deducting from the same \$1,260, the balance due on the Busenbach judgment.

In addition to the above sum, the bank agreed to pay Mrs. Sutherland \$3,000 for her right of dower; and it was agreed that the proceeds of the land covered by the mortgage, to secure the payment of the two unindorsed notes of Sutherland, and the two notes indorsed by Hough should be first applied in payment of Hough's liability; and that the residue of such liability should be discharged out of the proceeds of the property conveyed, exclusive of that which was mortgaged to secure the payment of the notes indorsed by Findlay; and it was stipulated that the property should be offered by the marshal at public sale.

Sutherland executed the conveyances in pursuance of the agreement; and the property was publicly sold by the marshal, and credited by him on the several executions and order of sale, under which it was sold. The proceeds of the mortgaged property were applied in discharge of the liabilities which the mortgages were intended to secure; and the proceeds of the levied property were apportioned between the judgment against Sutherland and Hough, and the two against Sutherland only.

The bank purchased the property at the marshal's sale, for

less than the contract price. For the property levied on, the bank agreed to give the sum of \$5,939, and this property was struck off by the marshal at the sum of \$5,206 53.

On the 10th September, 1830, the bank conveyed the lot in Cincinnati (conveyed to it under the contract with Sutherland for \$10,000) to D. Griffen for the consideration, as named in the deed, of \$19,000.

These are the principal facts out of which this controversy has arisen.

Before the merits of the case are considered, it may be proper to notice an objection which arises to the jurisdiction of the Court, from the parties to the suit.

The complainants are citizens of Ohio, and Timothy Kirby, alledged to be the agent of the bank, and Samuel Gray, administrator of Sutherland, and Thomas D. Carneal and Lewis Whiteman, administrators of Irwin, whose citizenship is not alledged, are made defendants. To give jurisdiction to the Court, it is as necessary to alledge the citizenship of the defendants as of the complainants. This is in the nature of an original bill, and calls for the exercise of chancery powers; and if the defendants named are citizens of Ohio, it is clear the Court, cannot, as the parties now stand, take jurisdiction of the case.

It is true, the whole object of the bill is to have certain credits entered on judgments of this Court; but the right of the complainants depends on the construction of an instrument, dated long after the judgments, and of certain equitable liens as between the sureties of Sutherland.

This objection may be obviated by discontinuing the bill as to Kirby, who is not a necessary party; by making the administrators of Irwin co-complainants, and by discontinuing the bill as to the administrators of Sutherland. If the estate of Sutherland cannot be affected by a decree in this case, as

it most clearly cannot be, his administrators are not indispensable parties in the case. In addition to this, the proof in the case shows that Sutherland died insolvent.

With this intimation, which may be a matter for future consideration, the questions made in the argument will be examined.

The complainants insist that they are entitled to a credit on the judgments against Sutherland and Findlay, for the fair value of the Cincinnati lot, or the sum for which it was sold by the bank, deducting therefrom a reasonable amount on account of dower.

At the time Sutherland conveyed this lot to the bank, the title was, to some extent, embarrassed; and there is no proof that the sum at which it was estimated was less than its value. There is no allegation of fraud in the conveyance of the lot to the bank, for the price agreed; and if such an allegation were made, it would not be supported by the fact that some fifteen months afterwards, the lot was sold by the bank at an advance of eight thousand dollars. Within this time an outstanding claim was bought in by the bank, the right of dower was paid for, and the property may have risen in value.

A debtor has an undoubted right fairly to convey his property in satisfaction of a debt, without the assent of his surety. If such conveyance be made fraudulently, with the view of injuring the surety, it should be set aside. But if the parties act in good faith, and the transaction is characterized by fairness and propriety, though without the knowledge of the surety, he has no ground to complain, much less to set aside the conveyance.

But in this case there is satisfactory evidence that Findlay, admitting him to be the surety of Sutherland, was desirous that the lot should be conveyed to the bank for a sum less than that which was agreed to be paid for it.

The conveyance of this lot, and the other property, was made by Sutherland under the agreement which fixed the price at which the whole property was taken by the bank; and if this agreement, in so material a part as this, shall be set aside, how can any part of it be enforced. And if the agreement does not stand, the sales by the marshal, being public and in pursuance of legal process, must stand. This would reduce the gross sum for the property much below the price allowed in the agreement.

In no point of view, as it regards the price of the property conveyed, is there any ground on which to set aside this agreement. There is neither hardness, unfairness, fraud, nor want of assent of the surety, on which to give relief.

The counsel for the bank insist that the evidence in the case does not show that Findlay was the indorser on the notes, without any interest in them, for the benefit of Sutherland.

The notes were indorsed by Findlay and Irwin, and were discounted for the benefit of Sutherland. He is treated as the principal by the bank, in the negotiations respecting the property, in giving the mortgages, and, finally, in the conveyance of the property to the bank. In the agreement between Sutherland and the bank, respecting the property to be conveyed, the judgments are referred to as "against Sutherland and others as his securities."

It is true that the judgments are not in form entered against the indorsers as sureties, but this does not lessen the force, and, indeed, the conclusiveness of the facts admitted. The parties to the agreement evidently looked more to the facts, with which they were familiar, than the technical description of the judgments.

But, independently of this admission, there is enough in the facts of the case to show that Findlay was surety. If Sutherland were not principal, why did he give the mortgages to se-

cure the payment of all the notes? Why did he negotiate with the bank to take property in payment of them? and why did he, finally, convey all his property to the bank? No doubt is entertained of the suretyship of all the indorsers on the notes specified.

The relationship of principal and surety being established between Sutherland and Findlay, if this relationship continue, under the circumstances of this case, it may be proper to inquire whether the complainants would be entitled to the priority of the judgment against Sutherland and Findlay first levied, of which they have been deprived to some extent, under the agreement. The proceeds of the property, bound by this lien, were applied to pay the judgment and note for which Hough was liable.

This great head of equity is derived from the civil law, and is founded upon the immutable principles of justice and benevolence. It protects the rights of sureties as between themselves, compelling a just contribution from each; and as against their principal, by subrogating them, on the payment of the debt, to all his rights. And it will, under certain circumstances, interpose its powers, and prevent the principal from impairing or destroying the collateral indemnities which he holds from his debtor; or, if destroyed, will, to the same amount, relieve the sureties. And this does not embrace securities taken at the time the debt was created only; for where the principal in a bond having been sued, gave bail, against whom judgment was entered, the original sureties having paid the debt, obtained a decree for the assignment of this judgment. *Parsons v. Braddock*, 2 Vern. 608. *Wright v. Mosly*, 11 Ves. 22. 3 Bligh Rep. 590, 591. 6 Ves. 805. 1 Story's Eq. 477. 1 Ves. 339. 2 Ves. 569, 570. 2 John. Chan. 560. 4 John. Chan. 323.

But the great question in this case is, whether, after judg-

ment, the relationship of principal and surety exists. The affirmative of this question is earnestly and ingeniously maintained, by the complainants' counsel.

They rely upon certain statutory provisions, and the decision of the Supreme Court of the State.

By the 8th section of the act to regulate judgments and executions, passed 24th February, 1824, it is provided, that in all cases where judgment is rendered upon any bond, sealed bill, promissory note, or other instrument of writing, in which two or more persons are jointly and severally held and bound, if it shall be made to appear to the Court that one or more of said persons so bound, signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk, in entering the judgment, to designate the principal and sureties, and the execution is required to issue first against the principal whose property shall be exhausted, before execution shall issue against the surety.

And in the 9th section of the act to regulate proceedings where banks or bankers are parties, passed February 2, 1824, it is provided, that a bank may bring a joint action against all the drawers or indorsers and declare for money lent, &c.

These statutes introduce a new principle in pleading, and in the rendition of judgment in certain cases; and they seem to have been, in the mind of the Legislature, in some degree connected. They were passed at the same session. That which authorized a joint proceeding against all the drawers or indorsers, and which, by construction, authorizes a procedure against all drawers *and* indorsers being first enacted, seemed to require a protection to sureties which was given in the second statute.

This statute provides a new remedy for sureties unknown to the law, but it does not establish any general principle, or change the relation of principal and surety as it before existed.

The remedy affords summary relief to a surety against the hardship or inconvenience of a joint judgment, as authorized by the previous statute; but it does nothing more than this. And it might be a matter of doubt, if the relationship of principal and surety exist after judgment, whether equity could interpose in a case where this plain and adequate relief at law had been neglected. Unless this be made an exception to the general rule, equity could give no relief except upon special ground of fraud or circumstances, which prevented or rendered ineffectual the remedy at law.

The case of *Dixon and Hawke v. Ewing's Administrators*, 3 Ham. 280, is considered by the counsel as conclusive of the present question.

That was a bill in chancery which stated that the complainants joined in a title bond to Ewing, as the securities of one Foot, for the conveyance of a tract of land. They had no interest in the transaction. Foot failed to convey the land. Suit was brought on the bond and a judgment obtained. Execution on the judgment was issued and levied on the personal property of Foot. The levy was afterwards discharged by the plaintiff's attorney, without their knowledge, and the property was returned to Foot. And the Court enjoined the plaintiffs at law to the amount of the value of the property levied on.

In their opinion the Court say, "our statute for the relief of bail and sureties is a beneficial one, and although this case, as it now stands, is not within its letter, it is within its spirit, at least, so far, as injurious preferences are attempted."

This decision rests upon general principles, and not upon the construction of a statute. If it involved the construction of a statute of the State, it would, under our practice, constitute a rule of decision for this Court. But standing, as it does, upon principles of general law, it can only be considered as the authority of a high and enlightened Court. In this view it will

be regarded, and if it shall fail to establish the rule on this subject, it cannot fail to command the highest respect.

The decision is in point and if it be conformable to law, it is conclusive of the question under consideration.

A case similar in principle, and not very dissimilar in facts, came before the Supreme Court of the United States, and is reported in 3 Wheat. 520.

In that case a judgment was obtained against the maker of the note, and a separate judgment against the indorser. The indorser fearing the failure of the maker of the note, called upon the agent of the plaintiff and requested an execution to be issued. It was issued, and the indorser offered to point out property to the marshal on which he might levy the amount of the judgment; and proposed to indemnify him for so doing. The execution was recalled by the plaintiff's agent, and the maker of the note became insolvent.

In their opinion the Court say, "although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged without timely notice of nonpayment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or, if he issues an execution, he is at liberty to make choice of the one which he thinks will be most beneficial to himself without consultation with the indorser." And they add, "if the indorser suffers any injury, by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment against the maker." The assignment of the judgment was provided for by the statute of Maryland.

It is insisted that the language of the Court, in this case,

means nothing more than to "distinguish the position of the indorser after judgment, from that of conditional liability, which he occupies before it." But is this the full import of the decision? Do not the Court say, after judgment, the plaintiff is not bound to take out execution against the principal, or if issued, to have it levied, though property be shown to the marshal, and an offer be made to indemnify him; and this in a case where the principal became insolvent, and all recourse against him was lost?

If the relation of principal and surety existed after the judgment, and the surety had an equitable right to do what he did do, he had good ground for relief. But the court take this position from the surety. They tell him that his liability is in no respect affected by the conduct of the creditor, and that he is bound, absolutely bound to pay the judgment.

The same principle is decided by Chancellor Kent in the case of *Bay v. Tallmadge*, 5 John. Ch. 312. That was a case where there was a postponement of an execution against the principal, without the assent of the sureties, and to their injury. But the Chancellor says "the postponement did not discharge the sureties from their obligation to pay the judgment against them." "Their privileges as bail," he says, "were lost and they had become fixed as principal debtors." And he further remarks, "I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes then too late to inquire into the antecedent relations between the parties. Those relations become merged in the judgment."

My researches have not enabled me to find a single case, except the one cited from the Ohio reports, where relief has been given on the ground that the relation of surety subsists

after judgment. There are many cases where a Court of Chancery has acted on this relationship and given relief before judgment.

In some instances, under very peculiar circumstances, it has required the principal to use peculiar diligence. And in all cases where the surety has paid the debt of his principal, equity will substitute him to all the rights of the creditor. This doctrine is learnedly discussed by Chancellor Kent, in the case of *Williard et al, v. Cheeseborough et al*, 1 John. Ch. 408; and by Mr. Justice Story, in his Treatise on Equity, 1 vol., under the head of Substitution; 2 John. Ch. 562. 3 Merivale, 579. 2 Fonb. 302, n. 1. 17 Ves. 517, 520, are, also, full on the point. In the case of *Hays v. Ward*, 4 John. Ch. 123, Chancellor Kent, under peculiar circumstances, enjoined a suit at law against a surety, until the creditor had pursued his remedy on a mortgage for the same debt.

But these cases all proceed upon equities held to exist prior to the judgment, or upon the fact of payment of the judgment by the surety. And this doctrine, when examined, will be found consistent with the principles of justice.

A rule which would make the liability of a surety depend upon contingencies until all the resources of the principal were exhausted, and that by a strictly legal course, would seem to regard the protection of the surety more than the safety of the creditor. It would be inconvenient in practice, and not suited to a commercial community.

The accommodation indorser agrees to pay on condition of demand and notice. And why should he be permitted to vary his contract, or excuse himself from its performance? By paying the money he is substituted to all the means of coercion against the principal which the creditor could use; and, also, to all the collateral indemnities he holds. And after judgment against him, this is the only relief, it would seem, which the

law gives him. It is as ample a one as can be afforded, and imposes no hardship, of which the surety has a right to complain.

In the present case Findlay's character, as surety, was merged in the judgments; and he could claim, as surety, no equities but the right of substitution on the payment of the judgments.

If Findlay be regarded as a principal, and equally liable with Sutherland to pay the judgments, it is not perceived on what ground he can ask the interference of this Court.

The position assumed by the counsel is admitted, that where a creditor has a claim on two funds, and another creditor has a claim on one of the funds, equity will either restrain the creditor from going against the fund liable to both, or, on its exhaustion, will substitute the creditor of this fund to the rights of the other.

But how can this doctrine be made to apply in the present case? The defendants are all principals, and Sutherland, the owner of the property, is bound to pay all the judgments. And by a conveyance of his property he does pay one in full and others in part. Now, is there any principle of equity which will restrain him from doing this? I confess I know of none.

The complainants insist that it was not the intention of the bank to make an application of the proceeds of the lands conveyed to it by Sutherland, different from that which the law would make.

Mr. Jones, the agent of the bank, does state in his deposition, that he objected to the clause in the agreement, which provided that Hough's liabilities should be first discharged, and that it was agreed that this clause should be altered. But this statement is not corroborated by Mr. Wood, who drew the agreement, and no alteration of it was ever made. On the

contrary, it appears that the bank permitted satisfaction to be entered of the judgment against Hough, which sanctioned this part of the contract.

It would be extremely dangerous to admit parol evidence to vary, or alter, a written agreement. The rule is well settled, that such evidence cannot have this effect, especially where the written agreement has been acted on and confirmed, and there is no fraud.

The marshal, it appears, credited the amount of his sales on the respective executions and order of sale; and this, it is insisted, is obligatory on the bank, and must fix the rule by which the proceeds of the lands conveyed must be applied. The credits thus entered show, it is urged, the election of the bank, which, being made, cannot be changed.

On the other side, it is contended, that the credits were entered by the marshal without the direction of the bank, which looked to the agreement for the application of the proceeds, and not to the marshal.

It is very clear that the act of the marshal, in this respect, cannot bind the bank, especially where a different application of the proceeds had been made by the parties.

The marshal's sale was provided for in the agreement, probably, with a view to perfect the title, and give to Sutherland the benefit of any advance of price for which the lands might sell. They sold for less than the contract price, and, of course, the sale could have no effect on the contract. We must look to the contract, and not to the marshal's sale and return, for the sum to be credited, and the mode of its application.

The agreement does not change, except as to the judgment against Sutherland only, the legal application of the proceeds of the mortgaged premises. It provides that the judgment, including interest and costs, of \$5,462 20, and the note, including

interest, amounting to \$4,779 88, shall be first satisfied and discharged out of said sum of \$25,794, so far as derived from the property mortgaged to secure said judgment and note; and the residue to be satisfied out of the proceeds derived from the other property, not interfering with the amount received from the property mortgaged for other purposes.

The balance remaining due on the above judgment and note, after exhausting the mortgage given to secure their payment, is, by the agreement, to be paid out of the proceeds of the lands not mortgaged. And no ground is perceived which authorizes this Court to change this application of the proceeds of this property. It disregards the priority of the judgment against Findlay, but of this, as has been stated, his representatives cannot complain. He stands as a principal in the judgments, and can be considered in no other light, until the judgments shall be satisfied.

The judgment against Sutherland, only, was secured by mortgage, but the proceeds of this mortgage, under the agreement, were applied in the payment of Hough's liabilities. So that that judgment stands without any special provision for its payment.

It is insisted, that this judgment shall be paid out of the proceeds of the property not covered by the mortgages, on the ground that the bank had a right to make such an application. The bank, undoubtedly, might have provided in the agreement for the payment of this judgment in the manner stated, but it has not done so; and the Court, under the peculiar circumstances of this case, will not direct the credit to be thus entered. This judgment must stand with the judgment against Findlay, both of which were entered on the same day, and levied at the same time, to be discharged in proportion to their respective amounts, out of the proceeds of the property levied on.

Lessee of Sumner v. Moore.

It is agreed in the contract that the premises described shall be taken by the bank, subject to the judgment of Busenbach.

If the bank, in the language of the agreement, received the property subject to this judgment, no deduction should be made, from the consideration stated, on account of it. Indeed, it would seem that this judgment was deducted from the general amount, before the contract was drawn.

The calculations can be made, and the credits entered, in conformity with this opinion.

Decree, &c.

LESSEE OF SUMNER vs. MOORE.

A vague levy on land may be rendered certain, by the appraisement, in which it is particularly described.

The sheriff's deed being certain, cannot be avoided, collaterally, by a defect in the levy. The deed is the act of the sheriff, and is taken in connection with his return.

However irregular a proceeding may be, the title of the purchaser cannot be affected by it, unless the proceeding was absolutely void. If only voidable the title must stand.

If an execution be issued on a dormant judgment it is irregular, and the execution may be set aside, on motion; but a title, under a sale, on such execution is good.

Where a levy has been made, the sheriff may go on and sell, though the decease of the defendant occur subsequently to the levy. If, however, the defendant die before the levy, the judgment must be revived.

Prior to the act of February, 1824, the venditioni exponas might issue either to the old or new sheriff, either of whom could sell the property levied on.

OPINION OF THE COURT, BY JUDGE LEAVITT.

This is an action of ejectment; and the case is submitted to the Court upon a statement agreed upon by the parties.

The facts presented in the statement, and the papers to which it refers, on which the plaintiff claims title to the premises in controversy, are these: John Brown, then of Scioto

county, Ohio, being seized in fee of the land in question, on the 23d of October, 1823, made his will, devising his real estate to his wife, Hannah Brown; and, dying soon after, his will was duly admitted to probate in said county. Hannah Brown, on the 16th of February, 1825, made her will, devising her real estate to her grand-daughter, Minerva E. B. Lucas; and died some time prior to the 2d of August, 1827; and her will was, also, duly admitted to probate in said county. Minerva E. B. Lucas, since the death of Hannah Brown, has intermarried with, and is now the wife of, the lessee of the plaintiff.

The defendant claims title under a deed from Jacob P. Noel, who was a purchaser of the premises at sheriff's sale. The facts connected with this sale, as presented to the Court, are as follows:

At August term, 1822, of the Court of Common Pleas of Scioto county, two judgments were rendered in said court against the said John Brown; one in favor of John Smith, and one in favor of Peleg O. Whitman. Several writs of *fi. fa. et lev. fa.* having issued on said judgments, on which no levy was made, new writs issued 21st July, 1823; on these the sheriff returned that he had levied on 48 acres and 89 hundredths, part of fractional sections 13 and 14, township 1, range 21; and part of southeast quarter of section 10, township 1, range 21; and, also, 72 acres and 77 hundredths, part of southeast quarter, section 10, township 1, and range 21; which are the lands claimed by the plaintiff. After several writs of *venditioni exponas* had issued, some of which were returned, not sold for want of bidders, and others, not sold for want of time; on the 4th of December, 1824, new writs of *ven. ex.* issued; one of which was returned by the sheriff, *defendant dead*—the other was not delived to the sheriff. No other process was taken out till the 27th of January, 1830; when a *vendi.* issued on Whitman's judgment, and the sheriff returned thereon, a sale

of the 72 acres and 77 hundredths tract, to one Elias K. Hitchcock; and, as to the other tract, not sold for want of bidders. At the March term, 1830, of the Common Pleas of Scioto county, the proceedings of the sheriff were submitted to the Court; the sale was confirmed, and a deed ordered to be made to the purchaser.

It also appears that the sale and appraisement of said tract was subsequently set aside by the Court, and a new appraisement ordered. And on the 26th of July, 1832, other writs of vendi. ex. issued, which were placed in the hands of the then sheriff of Scioto county, returnable to September term, 1832; and, at that term, the sheriff returned a new appraisement of the land, describing it by metes and bounds; and, also, returned that he had sold the lands to Jacob P. Noel. At the same term a motion was made for the confirmation of said sale; and, the motion having been entered on the journal of the court, was continued till the succeeding term. At that term the sale was confirmed by the Court, and an order entered requiring the sheriff to convey to Noel, the purchaser.

It is insisted by the counsel for the plaintiff, that the proceedings, on the judgment against Brown, are void, on several grounds; and that, therefore, the sheriff's deed vests no title in Noel.

First: It is contended that the levy is a nullity, on account of the vagueness and uncertainty in the description of the land levied on.

It seems to be a well settled principle of law, that a levy must describe the land with such certainty as to apprise the purchaser of what he is buying, and enable the sheriff to put him in possession of the specific property sold. And it is clear that the levy in question, in this respect, is defective. But this is a defect which may be supplied. 3 Ohio Rep. 274; 5 Ohio Rep. 524. And the Court is of opinion that the second

appraisement of the land, in which it is described by metes and bounds, cures the defect in the levy. The sale was made, and confirmed by the Court, under this appraisement; and the deed was ordered to be made with reference to it.

But, if this defect in the levy had not been thus supplied, it could not be invalidated in this collateral manner. The authorities on this subject fully support the position, that after a proceeding of this nature, not absolutely void in itself, has been examined, and adjudicated upon, by a court having jurisdiction of the matter, it cannot be inquired into, except in some direct proceeding instituted for that purpose.

The Statute of Ohio, in force when the proceedings, under the executions referred to, passed in review before the Court of Common Pleas of Scioto county, required the Court carefully to examine them, and, if satisfied, that the sale had been conducted according to law, to cause the clerk to make an entry on the journal to that effect. This was done, in relation to the proceedings in question, with more than usual deliberation. The motion for the confirmation was made and entered upon the journal, at September term, 1832, stating the appearance of the parties by counsel; it was continued till the next term, and then disposed of by the entry of an order confirming the sale, and directing the sheriff to execute a deed.

This inspection of the proceedings under the executions, and the judgment of confirmation which followed, are clearly judicial acts, within the jurisdiction of the Court, which can not be collaterally drawn in question.

In the case of *Thompson v. Tolmie*, 2 Peters, 162, the defendant claimed title to the premises by virtue of a purchase at a commissioners' sale, under the law of Maryland, relative to the division of intestate estates, in certain cases. It appeared that the statute had not been complied with, as to several important particulars. But the Court sustained the sale, and

laid down the law applicable to the case to be: that where proceedings are collaterally drawn in question, and it appears, upon the face of them, that the subject matter was within the jurisdiction of the Court, they are voidable only; and that errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court.

And in the case of *Vorhees and others v. the Bank of the United States*, 10 Peters, 471, the question was, whether certain proceedings, under the attachment law of Ohio, were to be regarded as void, on the ground of irregularity. There had been an order of court for the sale of property; a sale had been made, and was confirmed by the Court; and, although it appeared that several important requisitions of the statute had not been complied with, the Court held that the sale could not be impeached by any indirect proceeding. The principle is laid down by the Supreme Court, that where a court has performed a judicial act, within the scope of its jurisdiction, the regularity of its proceedings cannot be collaterally impugned, especially where the rights of innocent purchasers are involved. Upon the authority of these cases, and of others, in which analogous principles are sanctioned, the Court could not hesitate to sustain the levy upon the real estate of Brown, if its defects had not been supplied by the return of the new appraisal.

Second: It is strenuously urged by the plaintiff's counsel that, as there was a suspension of execution upon the judgments, from December, 1824, till January, 1830, a period exceeding five years; and no revival of the judgments by scire facias, all process subsequently issued, and all the proceedings had thereon, were wholly void.

The principles settled in the cases already referred to, apply also to this exception. However irregular the proceedings

may have been, the Court cannot, in this form, correct those irregularities. They have been submitted to, and adjudged of, by a tribunal clothed with power by the statute to pass upon them. The Court has caused it to be entered upon its journal, that those proceedings have been conducted agreeably to law; the sale by the sheriff has been pronounced to be a legal and valid sale; and an order has been entered authorizing the sheriff to make a deed to the purchaser. Upon the faith of this procedure the purchaser has paid his money, and has entered into the possession of the property. Can he now be disturbed in that possession?

In the case before referred to, *Vorhees and others v. the Bank of the United States*, the Court say: The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts, necessary to give jurisdiction, appear on the face of the proceedings; nor to look further back than the order of the Court. And, in 2 Peters, 163, it is said, if the jurisdiction was improvidently exercised, or, in a manner, not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the Court, as an authority emanating from a competent jurisdiction. And, again; where a court has jurisdiction of a cause, it has a right to decide every question that arises in the cause; and, whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court. 2 Peters, 169.

The effect of an execution issued upon a judgment, after it has become dormant by lapse of time, has been a subject of frequent adjudication; and it has been settled that, though an execution thus issued is irregular, it is not a nullity; though voidable, not absolutely void.

In the case of *Jackson v. Rosevelt*, 13 Johns. Rep. 102, the language of the Court is—the objections that it (the sale) took

place long after the return day of the execution, and that it did not appear that a levy had been made before the return day, and that the execution had not been issued until more than a year and a day after judgment, can not affect the sale. And, in the same case, referring to 8 Johns. Rep. 361, it is said, this Court decided that, in an action of ejectment against a purchaser under a sheriff's sale, the regularity of the execution could not be questioned; and that if an execution issues after a year and a day, without a revival of the judgment by *sci. fa.*, it is only voidable at the instance of the party against whom it issued. 3 Caine's Rep. 270.

In *Jackson v. Delancy*, 13 Johns. Rep. 550, a *scire facias* had issued to revive a judgment, but being served on a wrong party, the service was held to be a nullity. It was the same thing, says the Chancellor, as if execution had issued, and the lands been sold, on a dormant judgment, without any revival by *scire facias*. Still (he continues,) I take the law to be that even the omission altogether of the *scire facias*, will not, as of course, render void a sale under execution. An execution issued on a judgment, after a year and a day (the time limited in the State of New York, within which an execution must issue, or the judgment becomes dormant) without revival, has been held to be voidable only, and a justification to the party under it, until set aside. And a case is referred to by the Chancellor, reported in 2 Binney, 4, *Heester v. Fortner*, in which it was held, that a judgment revived by *scire facias*, after a year and a day, upon one *nihil* only, which is the same as no summons, may be set aside for irregularity, or reversed on error; but the irregularity can not be noticed collaterally in another suit.

In *Blaine v. the Charles Carter*, 4 Cranch, 328, a ship had been sold under executions issued within ten days after

judgment, contrary to the express prohibition of the act of Congress; but no writ of error was taken out; and the Court held, that if the executions were irregular, the Court, from which they issued, ought to have been moved to set them aside. "They were not void, because the marshal could have justified under them; and, if voidable, the proper means of destroying their efficacy had not been pursued."

And in another case, 4 Wheat. 506, involving the validity of a marshal's sale of real estate, under an execution, the language of the Court is: "The purchaser depends on the *judgment*, the *levy*, and the *deed*. All other questions are between the parties to the judgment and the marshal."

This doctrine has been expressly sanctioned by the Supreme Court of Ohio. In the case of *Green v. Cutright*, Wright's Reports, 738, it is said by the Court: "The party against whom process of execution issues, after it has lain five years, may have it set aside on motion, and put his adversary to his scire facias to revive the judgment; but the writ, so issued, is *not void*."

And the case of *Allen v. Parrish*, 3 Ohio Rep. 190, is regarded as sustaining the same doctrine. The question there was, whether a sale of lands upon execution is valid without an appraisement; and it was held that this irregularity did not render the sale void, and that the sheriff's deed, vested in the purchaser, not being a party to the judgment, a good and valid title to the lands sold under the execution. In the same case, the Court recognizes it as the doctrine of the English Courts, that any irregularity in the proceedings of a sheriff, in selling, will not affect the purchaser's rights, provided the sheriff had an execution authorizing him to levy, and did, in fact, levy and sell.

Third: We proceed now to the examination of the third exception taken to these proceedings by the plaintiff's counsel,

namely: That after the death of Brown, the judgment debtor, there was a suspension of all right to proceed upon the judgments; and that all the process issued, and proceedings had, subsequent to his death, were mere nullities.

On this point, the doctrine seems to be well settled, that an execution is an *entire thing*; and that, if land be levied on, in the lifetime of the judgment debtor, the sale may proceed after his death. The levy upon the property, by execution, is regarded, in the eye of the law, as an appropriation of it for the payment of the judgment, and vests in the judgment creditor an interest, which is not affected by the death of the judgment debtor. If the execution be levied after the death of the defendant, it is clear that such levy is a mere nullity; and, for the obvious reason, that the death of the party, by operation of the law, brings about a change in the ownership of the property. In the case of *Massies' heirs v. Long, &c.*, 2 Ohio Rep. 290, this subject is very fully investigated, and the Court consider it as well settled, that if the defendant die, after execution is sued out and levied, the execution proceeds as if the death had not taken place. This principle is indisputable; and, applied to the case before the Court, is conclusive against the plaintiff, on the last mentioned point.

Fourth: Another objection is taken to the proceedings in question. It is contended that the writs of ven. ex., issued subsequently to the expiration of the official term of the sheriff who made the levy, should have been executed by him, and not by the new sheriff.

It may be remarked here, that in no possible aspect of the case, could it make any difference, so far as the rights of the judgment debtor are concerned, whether the process was executed by the sheriff, in office when the levy was made, or by his successor. In the opinion of the Supreme Court of Ohio, *Fowble v. Rayberg and Taylor*, 4 Ohio Rep. 56, prior to the act of

February, 1824, the sale would be legal, whether made by the old or new sheriff. Until the enactment of that law, the practice was variant in different parts of the State. That statute, however, expressly provides, "that no venditioni exponas shall hereafter be directed to, or executed by, any sheriff whose term of office may have expired," &c. As this provision was applicable to, and governed the proceedings in the case before the Court, it is clear there was no irregularity in placing the writs of vendi. in the hands of the new sheriff for execution.

The exceptions to the defendant's title being overruled by the Court, judgment is accordingly entered in his favor.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1840.

JOSIAH DRAKE *vs.* ELWOOD FISHER.

A note dated at Cincinnati, and described in the declaration as dated at Cincinnati, in the State of Ohio, is admissible in evidence; especially where the fact is proved, or admitted, that Cincinnati is in the State of Ohio.

The contract being transitory, and the place where it was made having no effect upon its construction, the words, "in the State of Ohio," may be rejected as surplusage, and need not be proved.

It is sufficient to describe the note in terms, or according to its legal effect.

This case was argued by Mr. *Eggleston* for the plaintiff, and by Mr. *Brice* for the defendant.

OPINION OF THE COURT.

This action is brought on several promissory notes, and an objection is made to the introduction of one of the notes in evidence, on the ground that it is not described according to its tenor, or legal effect, in the declaration.

The note is dated at Cincinnati, 12. m. 1., 1837, and the declaration describes it as a note given at Cincinnati, in the State of Ohio, to wit: At Indianapolis, in the State of Indiana. And the plaintiff offered to prove that Cincinnati is in the State of Ohio, as alledged in the declaration. This, however, was not done until the objection was made by the defendant's coun-

sel, but the truth of the allegation is not controverted. Several authorities are cited by the defendant's counsel in support of his objection. In the case of *Kearney v. King*, 2 Barn. and Ad. 301, the declaration stated the note was given at Dublin, to wit: At Westminster, &c.; and at the trial it appeared that the bill was drawn at Dublin, in Ireland. And the Court held there was a fatal variance between the proof and the declaration, and a judgment of nonsuit was entered.

This variance was material, as the bill being given in Ireland was payable in Irish currency, which was less valuable than English currency, in which, it appeared from the declaration, the bill was payable.

Mr. Justice Bayley said—the Court must see upon the face of the record that the bill was drawn in Ireland, and it can not take notice judicially, that a bill drawn at Dublin, is drawn at Dublin, in Ireland. The instrument, it is said, is set out in the same words and letters as the bill produced. But that is not enough; for it must be set out the same in substance and in legal operation, which is not done here. The bill, in the declaration, appears to be for English money, when it is, in fact, for Irish.

This authority goes rather to sustain the declaration, as it shows the propriety, and, indeed, necessity in certain cases, where an instrument is dated at a particular place, to alledge in the declaration in what state or country such place is situated.

This has been held necessary, it seems, in case of specialties: Cowper, 177, Lord Mansfield says, if the declaration states a specialty to have been made at Westminster, in Middlesex, and, upon producing the deed, it bears daté at Bengal, the action is gone, because it is such a variance between the deed and the declaration as makes it appear to be a different instrument.

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In the case of *Alder v. Griner*, 13 John. 449, where the venue was laid in the margin of the declaration, to wit: "City and county of New York;" and, at the conclusion of the instrument, it was stated to be "done in Boston, in the day and year above mentioned;" the Court held that the variance was not fatal. They say, had the declaration averred the deed to have been made at New York, they would, probably, have been bound by authority, whatever may have been their private opinions as to the wisdom of the rule to set aside the verdict on the ground of variance.

In the case of *Munroe v. Cooper et al.* 5 Pick. 412, the note was described in the declaration as dated at Concord, whereas, on its face, it was dated at Boston. The judge, at the trial, admitted the note, though objected to; and the Supreme Court say, "as to the supposed variance, it has been usual, certainly, in cases like the present, to set out the true date of the note, both as to place and time, and to lay the venue under the form of a videlicet, and that this was the correct mode of declaring." But the point raised was not decided. To the same effect is the case in 16 Pick. 381.

In the case of *Houriet et al. v. Morris*, 3 Camp. 303, it was objected that there was a fatal variance, the declaration having stated that the notes were made in London, whereas, in fact, they appeared, on the face of them, to have been made in Paris. And, it was insisted, that the constant course is, in declaring on foreign bills, to state that they were drawn at the place where they bear date, adding the venue under a videlicet.

Lord Ellenborough said, the contract, evidenced by a promissory note, is transitory, and the place where it purports to be made is immaterial. And that he saw no reason why it might not be stated that the note was made in the Parish of St. Mary

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Le Bow, in the ward of Cheap, though dated at Paris, in the same manner as if it had been dated at York.

And in the case of *Ragan and others v. More*, 4 Black. 344, it was held, that a promissory note, dated at Union county, State of Indiana, might be declared on in another county, without noticing the words, "State of Indiana." The Court say that this variance is not material.

Now, the objection in the present case is, not that the declaration does not state the place at which the note was given, but that it alledges that such place is in the State of Ohio. Under the strictest rules of pleading, which have, at any time, been observed, this allegation could only require to be proved. And this the plaintiff offered to do, as we think, in time for the proof to be received. But the case has been argued without reference to such proof.

There are many cases in which it is material to alledge the place of the contract, as where it is materially affected by the local law, in regard to interest, currency, &c. But where this is not the case, and the action is transitory, no reason is perceived for stating in the declaration the place of the contract. The contract, or note, need not be described in its very words, but may be stated in the declaration according to its legal effect. And if the place where the note was made can have no influence on its legal effect, why should it be averred? In such a case the place is not traversable, and, if not traversable, need it be averred or proved.

There are some things which may be omitted, but which, if stated, must be proved. And the rule, in this regard, is laid down by Mr. Chitty to be, "that if the whole of the statement may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it; but, otherwise, if the whole can not be struck out, without getting rid of a part essential to the cause of action."

The Supreme Court, in the case of *Ferguson v. Harwood*, 7 Cranch, 408, decided that a variance is immaterial when it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.

Now, whether this note was made at Cincinnati, in the State of Ohio, or at Cincinnati, in some other State, is immaterial. It has no effect in the construction of the note, or on its legal operation.

By the rules of practice lately adopted in England, 4, W. 4, the venue is required to be stated in the margin, and not in the body of the declaration. And this would seem to render unnecessary any allegation of the place where the contract was made under a videlicet, within "the county from which the jury was to come," even in actions on specialties. If the place, however, where the contract was made, be alledged as matter of description, and not as venue, it must, in all cases, be stated truly, and according to the fact, under peril of variance, if the matter should be brought into issue. Stephen's Pl. 291. But this issue can be raised only in cases where the law of the place has a material bearing on the contract.

This declaration would have been good, if the words, "in the State of Ohio," had been omitted; and if these words were stricken out, it would not destroy the plaintiff's right of action. They may then be considered as surplusage, and need not be proved.

By the late change the rules of pleading in England have been simplified and improved, and we are more disposed to adopt the improvements, than to follow antiquated precedents, and unmeaning technicalities.

In the case of *Covington v. Comstock*, 14 Peters, 43, the note purported to be set out in the declaration according to its

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tenor, and it was stated to have been made payable generally, but on its face it was payable at a particular place; the Court held this was a fatal variance, and the judgment of the Circuit Court, on this ground, was reversed. And there can be no doubt that strictness is required where the plaintiff purports to set forth the note in terms. Upon the whole, we think, that whether we regard the proof offered, or the words objected to, as surplusage, the objection must be overruled.

VARNUM FULLER & Co. vs. M. H., M. M. & R. MILFORD.

If the holder of a bill, for a valuable consideration, give time to the maker of the note, he thereby discharges the surety.

The surety has a right to pay the note and to be substituted to all the rights of the holder, and any act of his which suspends this recourse by the surety, releases him.

By the laws of Indiana the surety, by giving notice to the holder, can compel him to proceed against the principal.

In some cases, independently of any statutory provision, the surety, by a bill in chancery, may compel the holder of the note to use active diligence.

This case was argued by Messrs. *Fletcher and Butler* for the plaintiffs, and by Mr. *Stevens* for the defendant.

OPINION OF THE COURT BY JUDGE HOLMAN.

This action is founded on two promissory notes, which the declaration alledges were made by the defendants, whereby they jointly and severally promised to pay to the plaintiffs the sums of money specified in said notes.

The defendant, Robert Milford, pleads that M. H. & M. M. Milford executed said notes as principal, and that he, the said Robert Milford, executed them as surety, and that after the said notes became due and payable according to the tenor and

effect thereof, to wit—on the 18th of July, 1837, in consideration that the said M. H. & M. M. Milford had agreed with the said plaintiffs, to assign them, the said plaintiffs, the amount of said notes (after deducting a credit on the largest of said notes of \$184 15) out of a certain judgment they, the said M. H. & M. M. Milford, were to obtain the following September, against one William Worthington, they, the said plaintiffs, without the consent of this defendant, did agree to, and with the said M. H. & M. M. Milford, to give them time upon said notes, and not to bring suit on said notes until after the then next ensuing September term of the Circuit Court; and that, in pursuance of said agreement, the said plaintiffs, without the consent of this defendant, did give the said M. H. & M. M. Milford time upon said notes, until after the said September term of said Court, nor did said plaintiffs sue on said notes until long afterwards, to wit: until the commencement of this suit, which, agreeably to the date of the writ, was the first of October, 1839.

To this plea the plaintiffs have demurred, generally; and the question presented for the consideration of the Court, is, whether the facts stated in this plea constitute a legal bar to the action against this defendant.

It has become a well settled principle that in action at law, on simple contract at least, the extending of the time of payment, by a valid contract with the principal, without the consent of the surety, operates as a release of the surety, and may be pleaded by him in bar of an action for the demand.

For if a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases, the surety will be discharged; and the surety has a right, either by a bill in equity, or, by a written notice under the laws of this

State, to compel the creditor to sue the principal as soon as the debt becomes due; or he may pay the debt himself when it is due, and immediately sue the principal. These are rights that are inseparably connected with his contract, and which cannot be impaired without his consent. And if the creditor, by a new and valid agreement with the principal, abridges these rights, by giving further time of payment, he absolves the surety from his obligation, and must look to the principal alone for his demand.

This defence had its origin in equity, but is now admitted in actions at law. See 1 Mad. 234. *Rees v. Berrington*, 2 Ves. p. 540. 1 Story's Eq. 320, 321. *Bank of United States v. Hatch*, 6 Peters 250.

And in the case of *The People v. Jansen*, 7 John. 332, it was held that there was nothing in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate a surety in one Court would exonerate him in the other. See, also, 1 Blackford 394. 2 John. Ch. Rep. 554. 3 Stark. Ev. 1389, 1390. *Paine v. Packard and Munson*, 13 John. 174.

The same doctrine is recognized in the case of *Sprigg v. The Bank of Mount Pleasant*, 16 Pet. 257. Although in that case, the contract being under seal, and oyer being had of the obligation, and the defendant having executed the bond as principal, the Court held that he was estopped from averring that he was only a surety. But the Court admit that when the action is on a promissory note the case is different, and expressly recognize the doctrine of the case of *Paine v. Packard and Munson*, *supra*, which was a suit upon a promissory note, and the surety was admitted to plead a special request, made to the plaintiff, to prosecute the principal, and alledging a loss of the debt by reason of his neglect to prosecute.

The agreement which will avail the surety as a defence to the action, must be founded on a valid consideration. A mere agreement by the holder of a bill, with the drawer, for a delay, without any consideration for it, and without any consent of the indorser, will not discharge the latter after his responsibility has been fixed. *M'Lemore v. Powell*, 12 What. 554. *Clark v. Derlen*, 3 Bos. & Pul. 363. *Davy v. Pendugrass*, 5 Barnwell & Alderson, 187.

In the case before the Court, the plea alledges that the defendant was only a surety, and that the plaintiffs, without the consent of the defendant, agreed with the principals, that in consideration that they, the principals, would assign to the plaintiff the amount due the plaintiffs, out of a judgment that the principals expected to obtain in a short time, that they would give time on said note and not bring suit until after the next Court; and that in consequence of said agreement time was given accordingly.

The consideration here alledged was a good and valid one. The assignment of the judgment was a proper subject of contract, and the agreement to assign it was a subject of value and presents a valid consideration for the time given to the principals, and rendered the agreement, to postpone the bringing of suit on the notes until after the next Court, obligatory on the plaintiffs. Their right of action, for the time being, was suspended, and, agreeably to the uniform tenor of the cases on this subject, the defendant was released from his liability.

It is, therefore, the opinion of the Court that the plea is good.

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DEN EX DEM SHREW AND WINTER vs. I. D. JONES.

At common law a judgment created no lien on the real estate of the defendant.

But as his land was made liable to satisfy the judgment, under the *elegit*, this created a lien.

There was a judgment lien on the lands of the defendant, in Indiana, before there was any express statutory provision on the subject.

This was held to be the effect of several statutes, which subjected lands to execution and sale under a judgment.

By the act of 1818 a lien was given from the rendition of the judgment. And this lien extended throughout the State.

The act of 1824 limits the liens of the judgments of the Circuit Courts of Indiana, to the counties in which the judgments were entered.

But this statute imposed no restrictions on the liens of the judgments entered in the Supreme Court of the State.

The act of 1831 limits, also, the judgments of the Supreme Court to the counties in which they shall be entered.

But this law being passed subsequently to the act of Congress of 1828, which adopts the execution laws of the States, &c., can have no effect on the judgments of the Federal Courts.

The jurisdiction of the Circuit Court of the United States is coextensive with the limits of the State of Indiana, and, consequently, the liens of its judgments extend throughout the State.

Prior to the act of 1831, the lien of the judgments of the Supreme Court of Indiana was coextensive with their jurisdiction, which extended to the limits of the State.

The land of a defendant in a judgment of this Court, may be sold on execution, notwithstanding a judgment may be subsequently obtained in the State Court, under which a levy was first made on the land.

This case was argued by Messrs. *Fletcher and Butler* for the plaintiff, and by Messrs. *Wright and Patterson, Chase and Lockwood* for the defendant.

OPINION OF THE COURT.

THE title to the lot for which this action of ejectment was brought is under a judgment of this Court, obtained the 5th December, 1837, by Shrew and Winston against David Miller and others. The fee of the lot was vested in Candler, one of the defendants. The first of January, 1838, an execution

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was duly issued upon said judgment and delivered to the marshal to be executed. This writ was returned, replevied, with a replevy bond duly executed.

Afterwards, the 17th December, 1838, another execution was duly issued, which was levied by the marshal upon lot one hundred and forty two, in the town of Logansport, as the property of Candler. This lot was sold by the marshal on due notice being given, to the lessor of the plaintiff, for the sum of five hundred and fifty dollars, which was paid, and a deed was duly executed by the marshal.

No copy of this judgment was ever filed in the Clerk's office, under the statute of Indiana.

The defendants' title was derived under a judgment against Candler and Sludge, the 26th February, 1838. Execution was issued on this judgment the 19th April, following, which was returned no property found. An alias fi. fa. was issued the 24th September ensuing, and levied on the lot in controversy, which was sold by execution the 10th May, 1839, to Jones, the defendant, who received the sheriff's deed.

The above facts are admitted by the parties, and that the proceedings in both cases were regular.

The judgment of this Court, under which the lessor of the plaintiff claims, having been first obtained, it is insisted that his right is paramount to that of the defendant. On the part of the defendant it is contended that the judgments of this Court create no lien on the real estate of the defendant, beyond the limits of the county in which judgment is entered; and that the judgment before the State Court in Cass county, where the lot is situated, being obtained before the levy under the first judgment, it has the prior lien. And this is the only question in the case.

As land was not liable to be sold on execution, or extended at common law, it is clear that at common law the judgment

created no lien on the land of the defendant. But the argument is not sustainable that a judgment can not operate as a lien on real estate, unless this effect be specially given to it by statutory provision.

The statute of 2 West. 13. Ed. 1, gave the *elegit* which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk. 212. 1 Wils. 39. 2 Leigh, 268. 6 Randolph's Rep. 618. 4 Peters, 124. 2 Brock. 252. 3 Bl. Com. 418. 2 Bac. 731. 5 Peters, 367.

The same doctrine was held by the Supreme Court of this State, in a learned and able opinion, in the case of *Ridge v. Prather*, 1 Black. 401. The Court say, "we have always had a statute at least as strong as that of West. 2, by virtue of which judgments are liens upon real estate." But until the act of 1818, there was no statute declaring that judgments should be a lien on real estate. In the view of the Court such lien arose from the various acts subjecting lands to execution.

The thirteenth section of the act of 1818, entitled "an act to prevent frauds and perjuries," gives a lien on the real estate of the defendant from the time of signing the judgment.

This statute, it would seem, was introductive of no new principle, but gave effect, from a specified time, to a judgment lien. It is unnecessary to inquire whether, prior to this time, the lien took effect from the commencement of the term, or not; it is enough to know that it existed.

The lien, under this statute, as well as that which existed before the statute, being general, must have extended throughout the State. The Circuit Courts had power to issue executions to any county in the State. And as their jurisdiction, thus to enforce their judgments, extended throughout the State, the lien must have been coextensive with their jurisdiction.

This act was modified by an act subjecting real and personal estates to execution, approved 30th January, 1824. The thirteenth section of this act provides, that judgments in the Circuit Courts are hereby made liens on the real estate of the defendant, or defendants, from the day of the rendition thereof, in the county where such judgments may be rendered. And, on recording a copy of the record of such judgments in the clerk's office of any other county, the same operates as a lien within such county.

This act is restrictive of the lien of a judgment of the Circuit Court, but it could have had no such effect on a judgment entered by the Supreme Court of the State. This point is not known to have been decided by the Supreme Court of the State, but it is one which would seem to admit of little or no doubt.

If, before the passage of this act, the liens of the judgments of the Supreme and Circuit Courts extending throughout the State, which, it is presumed, no one will controvert, it is clear that the restriction of the lien on the judgments of the Circuit Court, could impose no restriction on the judgments of the Supreme Court.

If any thing were wanted to make this view conclusive, it is found in the act of 1831. The twenty second section of this act, which was enacted to prevent frauds and perjuries, &c., provides that judgments in the Circuit and Supreme Courts of this State, shall have the operation of, and be, liens &c., in the county within which such judgments may be rendered.

This act has never received a construction by the Supreme Court of the State, nor is it important now to inquire whether the effect of it must be to limit the lien of the judgments of the Supreme Court to the county of Marion, in which, only, its sessions are held. It is enough to know that the object of the

act was, in some degree, to restrict the liens of the judgments of that court; and that such restriction was not imposed by the act of 1824. It is true that in the act of 1831 the Circuit Court is named with the Supreme Court, but this was necessary, as the latter act changed somewhat the duty of the clerk who records the transcript. The ground may then be assumed, that, up to the year 1831, the original judgments of the Supreme Court created a lien throughout the State.

By the act of Congress of the 19th May, 1828, it is provided, "that writs of execution, and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each State, respectively, as are now, and in the courts of such State."

This act places the States that have been admitted into the Union since the judiciary act of 1789 was passed, in regard to the proceedings of the courts of the United States, in all respects, with the exception of Louisiana, on the same footing. As this fact has often been stated by the Supreme Court, it is unnecessary to examine it.

The act of 1828 adopts the laws of Indiana which existed at the time of its passage, and not those which have been subsequently enacted on the same subject. Congress have not adopted the laws of any State, in regard to the practice of the Courts of the United States, prospectively. The law of Indiana, in 1828, in regard to judgments and executions in the Supreme Court, is the law by which the present question must be decided.

In the case of *Taylor v. Thompson*, 1 Peters, 367, the Court say, "the first point made by the plaintiff in error is, that, by the law of Maryland, which, it is admitted, is the rule by which this point is to be determined, a judgment is no lien on real estate before execution was issued and levied."

And in the case of *Conard v. Atlantic In. Co.*, 1 Peters, 453, the Court say, the judgments in the Federal Courts, within the district of New York, are liens upon real property in like manner as judgments of the State Courts, and to the extent of the local jurisdiction of the Court. And, so in every other State, the judgments of the Federal Courts have the same lien, to the extent of its jurisdiction, as the judgments of the highest court of the State.

The act of 1828 declares that the rules of proceeding, &c., shall be the same in the Circuit Courts of the United States as in the highest court of original and general jurisdiction of the State. The Supreme Court of Indiana is the highest court of the State, and its jurisdiction is coextensive with the State. Prior to the act of 1831, a judgment of that Court constituted a lien throughout the State, and as the jurisdiction of the Circuit Court of the United States is also coextensive with the limits of the State, its judgments must create a lien to the same extent.

If, as contended, the liens of the judgments of this court be limited to the county in which they are rendered, as in the inferior courts of the State, the judgments of this court have, in effect, no lien. The law of the State, which extends the lien of a judgment of the Circuit Court of the State to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right, under it, to require our judgments to be recorded by any clerk of the State Court.

The law of Indiana, regulating judgments and executions, as it stood in 1828, is the law of Congress, by adoption. Effect must be given to the provisions of this law, so far, at least, as they are adapted to the organization and powers of this court. If the rules of proceeding by the Circuit Courts of the State be followed by this court, effect is given to them without refer-

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ence to the limited jurisdiction of these courts. The limits of the State, in the exercise of the jurisdiction of this court, is as the limits of a county to the local court.

The modes of judicial proceedings and rules of property are different in the different States; and, in adopting those rules, Congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the State. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a State law, being framed in reference to the limited jurisdiction of the State Courts, for this reason can not constitute a rule for the Federal Courts, the legislation of Congress, on the subject, has been in vain. Such has not been the view taken by the Courts of the United States.

The law of the State regulates the proceedings of a sheriff on execution. He is to advertise the property, real or personal, &c., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the State.

The principles of the State law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction.

But as it regards the main, and, indeed, the only question in this case, we have no need to resort to this course of induction. As has been stated, the judgment of the Supreme Court of this State, in 1828, operated as a lien on the real estate of the judgment debtor throughout the State, and this is conclusive of the question. The same effect is given to the judgments of this court.

In the case of the lessee of *Sellars v. Corwin et al.* 5 Ohio Rep. 398, the Supreme Court, in a very elaborately considered case, decided that, under a law of that State giving judgment

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liens, in effect, the same as in this State, the judgment of the Circuit Court of the United States constituted a lien to the extent of its jurisdiction.

No supposed inconvenience which arises under the laws of 1828, in regard to judgment liens, and which have been remedied by the act of 1831, can operate against this construction.

In most of the States, it is believed, the judgments of the Circuit Court of the United States operate as a lien to the extent of its jurisdiction.

If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of Congress, or by a rule of this court, if the law of the State shall require the clerks to make such record.

JOHN T. BALCH vs. ISAAC AND SAMUEL COLMAN.

The rate of exchange between two places is not exclusively regulated by the expense of transporting specie from one place to the other.

The true rule is the current rate at which drafts on New York sell in specie, or its equivalent, at Lafayette, the two points named in the contract.

Messrs. *Ingram* and *Baird* appeared for the plaintiff.

OPINION OF THE COURT.

This action was brought on a promissory note for \$536, payable at the Lafayette Bank, with the rate of exchange between the place of payment and the city of New York.

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At the time the note was given the Lafayette Bank, and the other banks of Indiana, redeemed their notes with specie; but having suspended specie payments for some months past, a question was raised, what shall be the rate of exchange which the plaintiff has a right to demand. Shall it be the present rate of difference between the depreciated currency of the State and funds in New York; or, shall it be the ordinary rate of exchange between specie, or its equivalent, at Lafayette, and funds in the city of New York?

The judgment of this court is not given to be discharged in depreciated currency. The plaintiff has a right to demand specie, or its equivalent; and we can not regard the amount, which he has a right to recover by way of exchange, as of less value than specie.

When the contract to pay the exchange was made, both parties, no doubt, looked to a sound circulating medium, convertible into specie, and, of course, of value equal to specie. And, in such a state, how is the rate of exchange to be ascertained?

It is clearly not by ascertaining what would be the expense of transporting specie from the place of payment to the city of New York. This, undoubtedly, enters into the general calculation on the subject, and has great influence in fixing the rate, but there are other ingredients which must be looked to in making an estimate.

Specie is not transported at the same rate as other merchantable commodities. There is the risk, the insurance, the delays, and other contingencies, which are taken into the account; and, not unfrequently, the scarcity or abundance of specie at the place of remittance, has an important effect on the price of exchange. The only correct rule, therefore, is to ascertain the ordinary rate of exchange between the two places; to be established by evidence, the same as the value of

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any other thing. The inquiry of the jury should be, what was the current price of drafts, in specie, or its equivalent, on New York, at Lafayette, at the time this note became payable. This must give the rate of damages which the plaintiff claims, for the difference of exchange between the two places.

SAMUEL BISPHAM vs. PATTERSON AND WALTER.

By the English rule, the admissions of a late partner, are evidence to charge the firm.

A different rule has been established in New York.

And the Supreme Court seem inclined to adopt the New York rule.

Under the authority of this intimation, it is held that a letter of one of the defendants, admitting the account, on which the action was brought, cannot be received to bind the firm, the partnership having been dissolved before the admission.

This cause was argued by Messrs. *Fletcher* and *Butler*, for the plaintiff, and by Messrs. *Stevens* and *Barbour* for the defendants.

OPINION OF THE COURT.

THIS is an action of assumpsit, brought against the defendants as partners. The writ was served on Patterson, but the marshal returned non est as to Walter.

The plaintiff introduced, as evidence, the letter of Patterson, acknowledging the justice of the account on which the action was brought. This was objected to as evidence, on the ground that the letter was written after the dissolution of the partnership, and that it is not, therefore, evidence to establish a partnership demand. But the Circuit Judge observed that the evidence would be received as competent, and the point would be considered, if necessary, on a motion for a new trial.

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The jury found a verdict for the plaintiff, and the question of the admissibility of the evidence is now brought before the Court, on a motion to set aside the verdict.

It is a general principle that, in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the suit. 1 Phil. Ev. 92; 11 East. 589.

So, in an action by several partners, the admission by one is evidence against all. 1 Maule & Selw. 249. And where an action is brought against partners, the fact of partnership being proved, the admissions of any one of the defendants is evidence to charge the firm. 1 Phil. Ev. 92. 1 Stark. N. P. 6, 81. 4 Conn. 338. 15 John. 409. 2 Wash. 6, 6, 390. 2 Har. & John. 474, 477. 3 J. J. Marsh. 498, 500.

And, in England, it is held that the admission of a partner, though not a party to the suit, is evidence against another partner, who is sued as to joint contracts, during the partnership, whether made after the determination of the partnership, or before. 1 Phil. Ev. 93. 1 Taunt. 104. 2 Doug. 661. 2 H. Blac. 340. 2 John. 667. 1 Gallison 630. 1 Barn. & Cres. 169. 2 Barn. & Cres. 29. 2 Bing. 306. *Cady v. Chepherd*, 11 Rich. 400. And, in the case of *Pritchard v. Draper*, 1 Russ. & Mylne 191, which was decided by Lord Brougham, it was held that, though the admission of one of the partners be not only made after the dissolution, but be of a payment, which was made to him after the dissolution, the evidence may be received to bind the other partner.

No rule of evidence seems to be better settled, in the English courts, than this; and it is conceived to be settled on sound principles.

The dissolution of the partnership cannot affect the relation which the firm bears to its creditors. The individuals composing it are liable as partners; and, if they are thus bound, why should not the demand be established by the same evidence, as before the dissolution? The partnership continues in all its force, as it regards the particular transaction; and it would seem to be an anomaly, that the act of the parties, defendants, should change the rule of evidence on which their liability is to be established.

It is argued, that it would be dangerous to the interests of partners, if, after the dissolution, the admissions of one, in relation to a prior and partnership transaction, should be evidence against the firm. That, on this ground, it would be in the power of each individual that composed the late firm, to make it responsible for his private debts.

If there be any force in this argument, it goes against the principle, which admits the confessions of one partner, as evidence to bind the others, during the partnership. Now, this rule is believed to be no where controverted. It has been found safe in practice. But, if there be danger in receiving the admissions of a late partner, as evidence, in relation to a partnership transaction, the danger must be much greater to receive such admissions, as evidence, during the partnership.

In the latter case, the admissions may go to create an obligation on the firm, for an individual transaction; whilst the former can only relate to transactions prior to the dissolution. Admissions, under such circumstances, could rarely, if ever, go to prejudice the rights of the late firm. A bona fide individual transaction, originally, could not easily, by the confession of a late partner, be established against the firm. The danger consists in the power of the individual, at the time of the transaction, to give it a form which shall bind the firm.

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But this is a question to be decided by the force of authority, and not of reason.

The weight of American authority is against the English rule on this subject. In the cases of *Hackley v. Patrick*, 3 John. 536; *Walden v. Sherburne*, 15 John. 409; *Shelton v. Cocke*, 3 Mun. 191; *Walker v. Duberry*, 1 Marsh. 189; 9 Cowan, 57; *Baker v. Stackpole*, 9 Cowan, 420, 434; *Chardon v. Calder & Co.*, 2 Const. Rep. (South Carolina) 685; *White v. The Union Ins. Co.*, 1 Nott & M'Cord, 561; *Fisher's Exrs. v. Tucker's Exrs.*, 1 McCord's Ch. 171-2; *Ward v. Howell et al.*, 5 Har. & John. 60; 2 Black. 372, the rule seems to be settled that, after the dissolution, the admissions of a partner is not evidence to charge the late firm.

And, in the case of *Clementson v. Williams*, 8 Cranch, 72, the Court held that the acknowledgment of one partner, after the dissolution of the partnership, is not sufficient to take a case out of the statute of limitations. And, in the case of *Bell v. Morrison*, 1 Peters, 373, the Court held that, after a dissolution of partnership, no partner can create a cause of action against the other partners, except by a new authority, communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be supposed a pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it.

The case of *Bell v. Morrison* presented the question, whether, after the dissolution, the acknowledgment of a partner took the case out of the statute of limitations; but Mr. Justice Story, who delivered the opinion of the Court, considers the case very much at large, and takes occasion to say, that the New York doctrine was well founded. He, it is true, remarks that, whether the confessions of a late partner can, for any purpose, be admitted as evidence to charge the firm, was a question not

before the Court, though it had been discussed by the counsel on both sides; but, as its determination was not necessary in the case, it would not be decided. But the course of his reasoning has so direct a bearing on this question, and so clearly shows the view of the Court, that, unless we close our eyes, we can not escape from the effects of it.

I have read this opinion more than once, under the strongest conviction in favor of the English rule, and with a sincere desire to follow it, but the language of the opinion is so decisive and authoritative that I am forced to adopt the New York rule. The Court do not, in technical language, adjudge that the admissions of a late partner can not be received as evidence, but they say that the New York rule is a sound one, and they sustain its reasonableness and propriety. And this rule was shown to be the foundation of all the American decisions on the question.

I looked to this opinion with the more earnestness, as my brother Story, in the case cited from Gallison, had followed the English rule; the judgment in which case was taken to the Supreme Court, and affirmed. This point, however, though made, does not seem to have been expressly decided by the Supreme Court. There were several other points on which the case turned; but it is difficult to perceive how the judgment could have been affirmed, without ruling this point.

A distinction is drawn by the Supreme Court, between receiving the admissions of a late partner, to take the partnership debt out of the statute, and as merely evidence of the debt. That, to take a case out of the statute, a new obligation must be imposed on the late firm, which can not be done by the acknowledgments of a late partner.

In England, it is said the courts, on recent occasions, have been in the habit of considering that the effect of an acknowledgment of the debt, made by the defendant, is to create a

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fresh promise, and not to revive the promise which is barred by the statute. 1 Phil. Ev. 138. *Tanner v. Smart*, 6 Barn. & Cres. 606. But a contrary doctrine is held in *Pittam v. Foster*, 1 Barn. & Cres. 248; *Hunt v. Parker*, 1 Barn. & Ald. 93; *Ayton v. Bolt*, 4 Bing. 105; 3 Bing. 329, 638.

In the cases of *Shelton v. Cocke*, 3 Mun. 191, and *Smith v. Ludlow*, 6 John. 267, it was held that the admission of a debt by one of several partners, made after the dissolution, will take the debt, so admitted, out of the statute of limitations, though the original debt can not be so proved.

In the case of *Fisher's Ex'rs v. Tucker's representatives*, 1 McCord's Ch. 169, the Court say, the admission or promise of a surviving partner, will not even take the debt out of the statute of limitations, as to the estate of the deceased partner; much less, would it prove an original debt.

Amidst this conflict of authority, I yield my conviction in favor of the English rule, to the authority of the case of *Bell v. Morrison*.

The verdict is set aside, and a new trial granted.

JOHN R. WALKER vs. JOHNSON, Administrator of Kinnard.

Where a statute provides that an executor or administrator, if the estate be insolvent, may institute suit before a Probate Court, and, by giving notice, compel the creditors to exhibit their claims, to be adjudged and paid pro rata; and that no suit shall, afterwards, be brought against the executor or administrator, unless the plaintiff alledge that such executor or administrator has been guilty of fraud, negligence or waste, such allegation, in a subsequent suit, must be contained in plaintiff's declaration.

The declaration must show a legal right.

Two affirmative facts in a plea and replication may be so contradictory, the one to the other, as to make an issue.

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As, where the plea averred diligence in the prosecution of a suit, and the replication charged negligence.

In such case the replication would have been more formal if it had negatived the affirmation of diligence, in the plea, and concluded to the country.

The replication, in charging negligence, and concluding with a verification, is wholly irregular, and can not be sustained.

This cause was argued by Messrs. *Fletcher* and *Butler* for the plaintiff, and by Mr. *Morrison* for the defendant.

OPINION OF THE COURT.

THIS action was brought to recover the amount of a promissory note, given by Kinnard in his lifetime.

The defendant pleaded that, the estate being insolvent, he instituted a proceeding before the Probate Court of the State, of the proper county, under the statute, and that the plaintiff, having been notified, became a party to those proceedings, which are still pending; and the defendant avers that he has prosecuted the same with diligence, and, without fraud or waste, discharged his trust.

To this plea the plaintiff replied, that the defendant had been guilty of negligence, in prosecuting the suit in the Court of Probate, and concluded with a verification.

To this replication the defendant demurred specially.

The 22d section of the act to organize Probate Courts, &c., provides, "if the personal and real estate shall be insufficient to pay the debts, the administrator may make application to the Court of Probate, exhibiting certain inventories, and the Court is required to give notice to creditors to file their claims, which are to be duly adjudged and paid, so far as a proportionate distribution shall go.

"And, from the date of filing the complaint, no suit or action shall be brought or sustained against such executor or administrator, unless waste or negligence or fraud, in the discharge

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of the duties of his trust, as such, be alledged against such executor or administrator; and if any such suit or action be brought after the filing of such complaint, the plaintiff, complainant or claimant, alledging such fraud, negligence or waste, and such plaintiff, complainant or claimant, shall fail, upon the trial thereof, to establish such fraud, negligence or waste, against such executor or administrator, such plaintiff, complainant or claimant, shall pay the costs of such suit or action, although he may recover a verdict, decree or judgment, against such executor or administrator; for which costs, such executor or administrator shall have judgment."

The Court of Probate, under this statute, has jurisdiction in the mode pointed out, when the parties are properly brought before it; and its decision is final, and must be so held, until reversed.

On general principles, the pendency of a suit before the Court of Probate, of which it has jurisdiction, is pleadable, in abatement, to a subsequent action for the same cause. And there does not appear to be any thing in the mode of exercising jurisdiction in this case, which should make it an exception to the general rule.

The executor, finding the assets would be insufficient to pay the demands against the estate, instituted, before the Probate Court, the proceedings authorized under such circumstances. Notice was given, and the present plaintiff filed his claim, and became a party to the proceedings. These proceedings are still pending. And this is the substance of the plea, in abatement, to the present action, filed by the defendant, with the averment, that he has diligently, and without fraud or waste, discharged his duties, and prosecuted the suit in the Probate Court.

To this plea the plaintiff replies, that he has been guilty of negligence in the prosecution of the above suit.

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Regularly, the plaintiff should have negatived the affirmation of diligence, in the defendant's plea, and have concluded to the country; or, if he considered the plea defective, he should have demurred to it.

It is said that two affirmatives make an issue, when the second is so contrary to the first, that it can not, in any degree, be true. 1 Chitt. Pl. 691. Co. Lit. 126, *a*. It may be said, that negligence is opposed to diligence, and that the affirmatives, in these pleas, come within the rule. If this be admitted, it is still a most awkward and unsatisfactory mode of making up an issue. But, in any view, this replication can not be sustained, as it concludes with a verification, instead of an issue to the country.

The demurrer to the replication brings before the Court the sufficiency of the pleadings on both sides.

It is argued, that this proceeding is in the nature of an action against the administrator, suggesting a devastavit, and that it must be governed by the same rule.

However much in form this may be like an action charging a devastavit, in effect it is, in some respects at least, altogether different.

The administrator, by this proceeding, is not, necessarily, made personally responsible for the judgment. If, on the trial, it should be made to appear the defendant had been negligent in the prosecution of the suit in the Probate Court, that would not make him personally liable as on a devastavit; nor would the judgment probably be so entered against him, if he were convicted of waste or fraud.

There is another statute which regulates the proceeding against an executor or administrator, on suggesting a devastavit, and under which a personal liability is established. A procedure under this statute would, undoubtedly, be authorized by the probate act. The statute provides that, after the insti-

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tution of the suit in the Court of Probate, "no suit or action shall be brought or sustained against such executor or administrator, unless waste or negligence or fraud, in the discharge of the duties of his trust, as such, be alledged against such executor or administrator."

In the declaration, there is no such allegation; and the plea, which sets up the pendency of the suit in the Probate Court, and avers that such suit has been diligently prosecuted, &c., under the statute, contains matter which, if true, must abate the plaintiff's action. It shows a state of facts which, by the express provision of the statute, prohibits the plaintiff from sustaining his action.

The allegation of fraud, negligence or waste, is essential to the maintenance of the plaintiff's action; and this must be found in his declaration. His suit is brought during the pendency of the proceeding before the Court of Probate; and such suit, the statute declares, shall not be sustained, unless the allegation be made. Under this state of facts, the allegation is essential to the plaintiff's right to sue, and, consequently, it must be contained in the declaration.

In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption; but if there be an exception in a subsequent clause, that is matter of defence. 1 Chitt. Pl. 264. 1 Term, 144. 6 Term, 559. 1 East. 646. 2 Chitt. Rep. 582. All the circumstances, necessary to constitute a legal right of action, must appear on the face of the declaration. 1 Chitt. Pl. 276. Co. Lit. 17, a, 303. Com. Di. Pleader, 6, 7.

The statute does not originate the cause of action; but it protects the defendant from an action, unless he be charged with fraud, negligence or waste. Now, is this matter of defence to be set up by the defendant, or is it inseparably connected with the plaintiff's right to sue?

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An executor or administrator can only be made personally responsible, by a suit suggesting a devastavit; and this suggestion must always be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless negligence, fraud or waste, be charged.

Suppose a statute provided that an executor or administrator should not be liable to be sued, until after the expiration of a year from the time his duties commenced, unless he should be charged with fraud, negligence or waste, must not such charge be made in the declaration, if the suit be brought before the expiration of the year? And is not the case supposed analogous to the one under consideration?

As before remarked, the Court of Probate having jurisdiction of the case, no reason is perceived why, on general principles, the pendency of the suit there should not be pleadable in abatement, in a subsequent action for the same cause. But the statute authorizes a subsequent action, provided the plaintiff alledge fraud, negligence or waste, against the executor or administrator. In this view, the statute may be considered as enlarging the right of the plaintiff to sue, on certain conditions; and it would seem to be reasonable that he should show, in his declaration, the defendant is liable to be sued.

The statute provides that if, on the trial, the plaintiff shall fail to prove the allegation of fraud, negligence or waste, he shall, notwithstanding, recover a judgment for the amount due, but not for costs; but, if he prove fraud, negligence or waste, he may have, also, a judgment for the costs.

Upon the whole, we think, under the statute, it would be the most convenient mode for the plaintiff to make the allegation in his declaration, where he brings the suit under the above circumstances, and that such an allegation would be analogous to the rules of correct pleading.

On this suggestion, the plaintiff's counsel asked leave to amend their declaration, and it was granted.

John McClintick v. David Cummins.

JOHN MCCLINTICK vs. DAVID CUMMINS.

If the maker of a note prove that it was fraudulently obtained, the plaintiff, being assignee, is bound to show that the note was assigned to him for a valuable consideration.

The general issue, which denies the execution of the instrument, must be sworn to, under the statute of Indiana, which is adopted as a rule of practice in this Court.

This case was argued by Mr. *Brice* for the plaintiff, and by Mr. *Stevens* for the defendant.

OPINION OF THE COURT.

THE plaintiff, as indorsee of a promissory note, brought this action; and the defendant has pleaded the general issue, and annexed a notice that he would prove, on the trial, the note was fraudulently obtained by duress, &c. And the question now submitted to the Court is, whether, if fraud shall be proved, the plaintiff shall be required to show that the note was assigned to him for a valuable consideration.

The note and the assignment import a valuable consideration, but the consideration of either may be impeached. If a note were given without consideration, and was afterwards assigned for a valuable consideration, the original want of consideration would not be a good plea, by the maker of the note, against the assignee. Hence it is necessary, under the late forms of pleading in the action of assumpsit, adopted in England, for the maker of the note to plead, when the action is brought by the assignee, that the note was given, and also assigned, without consideration; and the plaintiff can then join issue, either on the want of consideration on the giving of the note, or on the assignment of it, but not on both.

The same question is substantially presented, in a form somewhat different, by the present notice. Under the notice, the defendant is bound to show that the note was obtained fraudu-

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lently, as alledged; and, this being done, the plaintiff is then required to show how he obtained the note. The fraud established, throws suspicion on the note, and devolves on the plaintiff the necessity of proving, that he received the note in the due course of business, and paid for it a valuable consideration. 5 Pick. 412. Chitt. on Bills, 78, 79. 5 Binn. 469. 1 Camp. 100. 2 Camp. 574.

A question is made before the Court, whether the statute of the State of Indiana, which requires a plea that puts in issue the execution of the instrument on which the action is founded, to be sworn to, is regarded by the Court. This statute is adopted as a rule of practice; and, unless the truth of the plea be verified by affidavit, the execution of the instrument need not be proved.

H. SUYDAM, & Co. vs. J. B. VANCE.

To release a surety the holder of a note must, for a valuable consideration, give time to the principal.

If the principal confess judgment at the first term, with stay of execution until the second, and it appears that, in the ordinary course of the business of the Court, a judgment could not have been obtained before the second term, no time is given which affects the liability of the surety.

Time given to the principal, at the instance of the surety, or with his consent, affords no ground for his release. Nor is an indorser discharged where time is given by an unauthorized agent of the plaintiff.

A witness must have a direct interest to render him incompetent.

An attorney who may be chargeable with negligence, is liable, only, to the extent of the injury his client has received.

This cause was argued by Mr. *Lockwood* for the plaintiffs, and by Mr. *Switzer* for the defendant.

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OPINION OF THE COURT.

This action was brought against the defendant as the indorser of a promissory note. The attorney, Mr. Lockwood, being sworn as a witness, stated, that he received the note for collection some time in the year 1838. That he shortly afterwards called on the defendant, as indorser, who admitted that he had received regular notice of the nonpayment of the note, and that he was liable to pay it.

When he received the note from the agent of the plaintiff, the witness observed, that if he should have to bring suit against the maker of the note, who resided in Illinois, he should expect a higher compensation than if the suit was brought in Indiana. That the defendant specially requested the witness to bring the suit against the maker. And the note was sent to Illinois, and suit was brought against the maker at the instance, and for the benefit, of the indorser.

The maker of the note executed a power of attorney to confess a judgment on the note, with stay of execution until the second term of the court; and it was proved, that in the ordinary course of proceeding in the court, a judgment could not have been obtained before the second term. No part of the note could be made from the maker, and this suit was brought against the indorser.

The defendant's counsel moved the Court, on this state of facts, to instruct the jury:

First: That the indorser was discharged from liability, as time was given to the principal on the judgment, as above stated.

Second: That the testimony of Mr. Lockwood was incompetent, by reason of interest, and should, therefore, be withdrawn from the jury.

In regard to the first point, it is a well established rule, that where the holder of a note, for a valuable consideration, gives time to the principal on the note, the surety is thereby discharged. It is the right of the surety, at any time, to pay the note, and be substituted to all the rights of the holder; and if the holder shall make a contract with the principal which shall suspend the right to coerce payment, this suspension is to the prejudice of the surety, and he is, consequently, released.

But in this case there seems to have been no suspension of the right of the plaintiff, and if there had been such suspension, at the instance, and for the benefit, of the indorser, his consent was a waiver of any advantage from it.

It does not appear that either the agent of the plaintiffs or their attorney was authorized to give time to the principal in the note; and if time were given without the authority of the plaintiffs, they are not to be prejudiced by it.

It is proved that, in the ordinary course of the business of the Court, a judgment could not have been obtained before the second term; there was no time given, therefore, which could affect the liability of the defendant. Whether we consider the assent of the defendant to the proceedings on the judgment in Illinois, or the fact that no time on the judgment was given beyond the ordinary course of the Court, or the power of the agent, it is equally clear that nothing has been done which goes to discharge the defendant. If the holder of a note, who has sued the maker, obtain a judgment, and agree, in consideration thereof, not to issue execution before a certain day, before which day he could not, by the practice of the Court, have otherwise obtained a judgment; this is not such an indulgence to the maker as will discharge the indorser. *Hallet v. Holmes*, 18 John. Rep. 28. *Bruen v. Marquand*, 17 John. Rep. 58.

There seems to be no ground on which to overrule the testimony of the witness, Lockwood.

It is contended that, by giving time on the judgment in Illinois, he has made himself liable to the plaintiff, and that by establishing a right of recovery against the present defendant, he exonerates himself.

In the first place there seems to be no ground on which to make the witness liable as an attorney. His liability attaches, in this view, only for gross negligence. And the extent of his liability depends upon the injury the plaintiffs may have received. It must be shown, therefore, not only that the attorney was grossly negligent in proceeding against the maker of the note, but that the amount might have been collected from him, had the proper steps been taken.

Now, there is no evidence of negligence whatever, nor any as to the ability of the maker of the note, at any time, to pay it. There is, therefore, not the shadow of a ground for the objection to the competency of the witness.

The verdict in this case can, in no respect, operate beneficially to the witness, in any suit which may be brought against him. And, indeed, it appears, from the facts, that he is in no shape liable to the plaintiffs, for the amount of the note in question.

The jury found for the plaintiffs, and a judgment was entered on the verdict.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1840.

CALVIN W. HOW & Co. *vs.* KEMBALL AND OTHERS.

An indorser of a note who increases his liability, by indorsement, beyond what the law implies, is to be considered as a guarantor.

And this new contract can only be enforced between the parties to it.

It does not pass to any subsequent assignee. The late decisions in England require an agreement to pay the debt of another to state in it the consideration.

That, under the statute of frauds, the consideration is a part of the agreement, which must be in writing.

Prior to these decisions the rule was otherwise. And the latest decisions seem not very strictly to sustain this construction.

In this country the weight of authority does not coincide with the English rule.

But in this case the guarantors are the holders of the note, and their guaranty is a part of the transfer of it, which imports a consideration.

Mr. Beaumont and Skinner appeared for the plaintiffs, and *Mr. Spring* for the defendants.

OPINION OF THE COURT.

This action is brought by the plaintiffs as assignees of the following note:

“On the 20th of August, 1838, we jointly and severally promise to pay James Kinza, or order, the sum of three thousand nine hundred dollars, with seven per cent. interest per annum from the date hereof, for value received of him.

MARK BEAUBIEN, Jr.,
MARK BEAUBIEN, Sen.

Chicago, August 20, 1837.

Calvin W. How & Co. v. Kemball and others.

Indorsed: "I assign the within note to Benjamin Harris, without any recourse on me. October 10, 1837. James Kinza."

"I hereby guaranty the payment of the within note, unconditionally. Benjamin Harris."

"We guaranty the payment of the within note, at the Chicago branch of the State Bank of Illinois. Kemball & Porter, A Garrett, George W. Dale."

In the first count in the declaration, the plaintiffs, who are the last assignees, set out the note and the assignments, and aver that when the note became payable, the said Mark Beaubien, Jr., did not reside in Illinois, but in Michigan; and that, the 24th August, 1838, at the city of Chicago, the said plaintiffs instituted a suit on the note against Mark Beaubien, Sen., against whom judgment was entered. That execution on the judgment was issued, which was returned no property.

The second count contains the assignments, and the note, &c., as the first count.

The third count contains the note, the assignments, and avers that the defendants assigned, and then and there guarantied the payment of the said note, on the day it should fall due, and payable at the Chicago branch of the State Bank of Illinois, &c. And that when the note became due suit was brought, &c.

The fifth count sets out the note, the assignments, and avers that the defendants promised to guaranty, and did guaranty, the same, as above, &c.

The sixth and seventh counts are substantially the same as above. The defendants pleaded the general issue. And, on the trial, an objection was made to the introduction of the note, and the indorsements thereon, on the ground that, in the first and second counts, the assignments of the note, merely, are set out, whilst the indorsements, under which the plaintiffs

claim, is a guaranty to pay the note at the Chicago branch of the State Bank of Illinois. And this guaranty, it is contended, is not evidence under the other counts, because the action is not brought on it, and no consideration for the guaranty appears either on its face, or from the averments in the declaration.

The indorsement of the note by the defendants to the plaintiffs, is not a mere assignment of the note, but the indorsers guaranty the payment of the amount, when due, at a specific place. This created a liability somewhat different from that which the law implies from an ordinary indorsement. On the face of the note no place of payment is designated. The indorsement, then, changes the place of payment, and binds the indorsers as guarantors for the amount.

This, to some extent, at least, must be considered a new contract. A contract which can only be enforced by the plaintiffs with whom it was made. Had they assigned the note, this guaranty, by the defendants, would not have passed to the assignee, as would a guaranty given at the creation of the note. It was a new contract, so far as a different liability from a simple indorsement was incurred, not incorporated in the note, nor transferable by its indorsement.

In the case of the *Oxford Bank v. Haynes*, 8 Pick. Rep. 423, it was held, that where upon a promissory note, made by S. and A. to the plaintiffs, were written the words—"I guaranty the payment of the within note," which were signed by the defendant, that he was a guarantor, and not a surety.

If the indorsement of the defendants be considered a guaranty, the action must be upon it as a special agreement, or upon the consideration which induced the defendants to enter into it. 2 Cox. 172. 2 Bro. 66, 614. 2 Schol. & Lef. 112. Chitt. on Bills, (Ed., 1839,) 373. The third count in the decla-

ration, and the counts that followed it, set out the guaranty, and the breach, &c.

And here a question is raised, and elaborately argued, whether this guaranty is binding, as it states no consideration. That this is an undertaking by the defendants to pay the debt of another, which by the statute of frauds must be in writing; and that, as a consideration is essential to the validity of every such agreement, it must be stated in the agreement.

The statute of frauds of this State, in regard to this question, is, substantially, copied from the 29 Car. 2, Ch. 3, sec. 4. "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or of some other person thereunto by him lawfully authorized."

Whether the consideration constitutes an essential part of the agreement, which, by the act, must be in writing, is a question that has been much discussed in England and in this country, and upon which courts have differed in their decisions.

Until the decision of the case of *Wain and another v. Walters*, 5 East. Rep. 10, was decided, Lord Ellenborough said, "we had always taken the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing; and so understanding the law we have no authority or disposition to change it."

The action of *Wain and another* was brought against *Walters*, as the assignees and holders of a bill of exchange, drawn by one Gore, and accepted by one Hall, which was due, and for the payment of which the defendant gave the following

promise in writing: "Messrs. Wain & Co., I will engage to pay you by half-past four this day, fifty six pounds and expenses on bill, that amount on Hall."

On this promise the plaintiffs alledged that they stayed proceedings, &c.; but the Court held that it was not binding, as the consideration, which was a part of the agreement, was not stated in it. That without a consideration the agreement was inoperative, and that they might as well hear parol proof of the promise as the consideration.

This decision has been much examined in England, and in several late cases has been confirmed. And particularly in the cases of *Saunders v. Wakefield*, 4 Barn. & Ald. 595. *Jenkins and another v. Reynolds*, 3 Brod. & Bing. 14. *James v. Williams*, 5 Barn. & Adol. 1109. *Claney v. Peggott*, 2 Adol. & Ellis 473.

The same doctrine has been sanctioned in the cases of *Leonard v. Vredenburg*, 8 John. Rep. 29. *Lanson v. Wyman*, 16 Wend, 246. It has been denied in the cases of *Hunt v. Adams*, Mass. Rep. 360. *Packard v. Richardson*, 17 Mass. Rep. 122. *Levy v. Merrill*, 4 Greenl. Rep. 180; *Ib.* 387. *Sage v. Wilcox*, 6 Conn. Rep. 81. *Miller v. Irvine*, 1 Dev. & B. Rep. 103. 5 Cranch, 151-2. In *ex parte Minet* 14, Ves. 189, Lord Eldon said, there was a variety of authorities directly contradicting *Wain and another v. Walters*; and in *ex parte Gardom*, 15 Ves. 286, he says, "until that case was decided I had always supposed the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear in the writing."

On reading the late English decisions on this subject, I cannot perceive the conclusiveness of the reasoning of the Judges. Nor can I perceive the danger of subverting the object of the statute, by adhering to what Lords Eldon and Ellenborough considered, before the decision of *Wain and another v. Wal-*

ters, its settled construction. And it will be found that in some of the latest decisions in the Queen's Bench, if the above case has not been departed from, its principles have not been very strictly adhered to.

An individual agrees, in writing, to pay the debt of another. It is admitted that without a consideration such an agreement is not binding. But why may not the consideration be proved by parol? This, the Court say, would open the door to fraud, which the statute of frauds intended to close. That as no agreement is valid without consideration, therefore the consideration is an essential part of the agreement, and must be in writing.

So a consideration is essential to the validity of a deed; and yet, where the deed upon its face expresses no consideration one may be proved by parol. *Peacock v. Monk*, 1 Ves. 128. *White v. Weeks*, 1 Penn. Rep. 486. *Davenport v. Mason*, 15 Mass. Rep. 85. *Hartley v. M'Anulty*, 4 Yeates' Rep. 25.

"No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough that the person, for whom the guarantor becomes surety, has benefit, or the person to whom the guaranty is given, suffers inconvenience, as an inducement to the surety to become guaranty for the debtor." Com. on Contracts, 242.

In the case of *Newbury v. Armstrong*, 6 Bing. 201, the Court held that the consideration sufficiently appeared on the following guaranty: "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ to the amount of £50." Mr. Justice Burrough observed, "whatever is necessarily implied may be taken to be in the instrument." And Chief Justice Tindall remarked, "we ought not to be too strict in the construction of these instruments; for if every agreement entered into by a

tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life."

In the case of *Davies v. Wilkinson*, decided in the Queen's Bench, May, 1839, and reported 1 Jurist, (Am. ed.) 372, the Court held the following instrument valid: "I agree to pay to Mr. C. Davies, or his order, £695 at four instalments, viz: £200 on June 10, 1833; £150 on the settling-day, after the St. Leger, at Doncaster; £150 on the settling-day, at Epsom, in 1834; £100 on the settling-day, after the St. Leger, in 1834; the remaining £95 to go as a set-off for an order of Reynolds to Mr. Thompson, and the remainder of his debt owing from Mr. C. Davies to him."

Lord Denman observes, "this instrument is a note, up to a certain point, but the addition makes it an agreement. As to the second objection, that if it be an agreement, there is no consideration on the face of it, I think the promise in this case conveyed by the words, "I agree to pay," imports consideration." How these words import a consideration more than the words, I promise to pay, is not perceived.

The Court seem to feel the practical inconvenience of their former decisions on this subject, and without overruling them expressly, are desirous of escaping from their consequences.

But in deciding the question now before the Court, it appears to me, there need be no conflict with the English decisions. The guaranty here is by the defendants as indorsers of the note to the plaintiffs. The defendants are the assignees of the note, and they assign it to the plaintiffs. Now an ordinary indorsement, as between the indorser and the indorsee, is evidence under the general count for money had and received. And this effect is given to the indorsement although in fact money may not have been the consideration passing between the parties.

Now is not the transfer of this note by the defendants to the plaintiffs, at the time of the guaranty, sufficient evidence of consideration? In the act of making the guaranty the property in the note is assigned. And does not this import a consideration? The guarantors are not only parties to the note, but the responsibility they assume is the ground on which the plaintiffs purchase the note.

There is, says Com. on Contracts, an important distinction between a collateral guaranty on a separate paper, or without indorsement, that a bill shall be duly paid by the parties thereto, and the act of indorsing the instrument. The collateral guaranty is void unless it be in writing and signed, and be given upon a sufficient consideration.

Where the guaranty or promise to pay the debt of another, is made at the same time with the contract to which it is collateral, is incorporated into it, and becomes part of it, the whole is one contract, and the want of consideration, as between the plaintiff and the guarantor, cannot be alledged. *Leonard v. Vredenburg*, 8 John. Rep. 29. And much less can a want of consideration be alledged by an assignor who in assigning a note guaranties the payment of it. This case is much stronger than the one cited from Johnson. The guarantor in that case, at the time the note is executed, guaranties its payment. He had no beneficial interest in the note, but was the mere surety of the maker. And as this was done at the time the note was given, the act of guaranty became incorporated in the note and constituted a part of it. The note may have been received on his credit, and he shall not set up a want of consideration.

The same reason applies with greater force against the defendants. Their guaranty was not only an inducement to the plaintiffs to receive the note, but they were the holders and owners of the note, and as such were interested in selling and

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transferring it to the plaintiffs. They, it is true, undertake to pay the debt of the drawers of the note, but they do so that they may pass the note to the plaintiffs more readily, and at its full nominal value.

If this be not the clear import of the transaction, both from the language of the guaranty, connected with the note and the assignment of it, and the averments in the declaration, I have failed to comprehend the subject.

Where the party himself is benefitted by the transfer, says Chitty on Bills, (edt. 1839) 272, it should seem that even his verbal promise would be valid. I cannot doubt that the defendants, under the circumstances of this case, cannot alledge a want of consideration, and I think the guaranty is sufficiently set out in the third and other following counts.

The District Judge, however, entertaining some doubts, as to the sufficiency of the averments of the declaration, to admit the evidence, a proposition was made to certify the point to the Supreme Court, under the act of Congress. But the plaintiff's attorneys, to avoid delay, asked leave to amend the declaration, which was granted.

HAWKINS AND DAVIS vs. SAMUEL THOMPSON.

A release of a remote indorser by the holder of a note, is a discharge of the subsequent indorsers.

Mr. *Davis* appeared for the plaintiff, and Mr. *Logan* for the defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit brought against the defendant as assignor of a note given by John Acheltree to Francis B.

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Thompson, for seven hundred dollars, dated the 30th February, 1837, and payable the 15th May, 1838.

The note was assigned by the payer to Samuel Thompson, the defendant, the 11th March, 1837, and by him to the plaintiffs the 29th January, 1838.

The issue of nonassumpsit was filed, and notice that the following release would be given in evidence:

“St. Louis, February 28th, 1838. Received of Francis B. Thompson, per the hands of his attorneys, one note on John Acheltree, of Maysville, Clay county, Illinois, for seven hundred dollars, due 15th May, 1838, in full of all claims which we have against him to this date; and we hereby release him from all such claims and demands, and from all responsibilities in consideration of the assignment of said note.” Signed by the plaintiffs, by their agent.

This being a negotiable instrument, the present plaintiffs, being assignees, had a right to sue the present defendant, their immediate indorser, or the payee of the note as a remote indorser. But the payee of the note was released by the plaintiffs from all responsibility under the assignment. And the question is raised whether this release does not, also, go to discharge the present defendant.

In the case of *English v. Darley*, 2 Bos. & Pull. 62, Lord Eldon said, “had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser.” And it has been declared that any credit given by the holder of a bill to the drawer, acceptor, indorser or promisor, is a consent to hold the bill upon their responsibility; and that the holder has no remedy afterwards but against them, where the circumstances of the transaction have rendered them liable absolutely. *Shaw v. Griffith*, 7 Mass. Rep. 494. In the case of *Smith v. Knox*, 3 Esp. Rep. 46, 49, Lord Eldon remarked, “it is said that the holder may discharge any of the indorsers after taking

them in execution, and yet have recourse to the others. I doubt the law as stated so generally. I am disposed to be of opinion that if the holder discharge a prior indorser, he will find it difficult to recover against a subsequent one." And this is the doctrine in the case of *Lewis v. Jones*, 4 Barn. & Cres. 506, 515, note, where it is expressly said that the releasing an acceptor or other prior party to a bill or note would discharge a subsequent party. This is fully established in a great number of cases. *Stewart v. Edan*, 2 Caines Rep. 121. 6 Dow. & Ry. 567. 8 East. Rep. 576. Time given to a drawer, or prior indorser, would discharge all subsequent parties.

But an acceptor or maker of a note can only be discharged by payment. All others are deemed sureties; 10 Barn. & Cres. 584.

Chancellor Kent, in treating on this subject, (3 Comm. 112) says, "the holder may give time to an immediate indorser, and proceed against the parties behind him. A prior party to the bill is not discharged by a release of a subsequent party. But the holder cannot reverse this order, and compound with prior parties without the consent of subsequent ones, for it varies the rights of the subsequent parties and discharges them." *Sergant v. Appleton*, 6 Mass. Rep. 85. *Clapper v. The Union Bank of Maryland*, 7 Harr. & Johns. 100.

From the above authorities it is clear that the release of a prior indorser, by the holder of a bill, discharges all subsequent indorsers.

The release in this case was to the payee of the note, who was the first indorser, and the suit is brought against his indorsee, who assigned the note to the plaintiffs. It does not appear whether or not the defendant was an accommodation indorser; if he were, the injustice to him would be flagrant, by attempting to recover the amount of the note from him, after releasing the first indorser.

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As by the release the first indorser was discharged "from all responsibility in consideration of the assignment of said note," we think the second indorser is also discharged, and that the plaintiff cannot sustain his action, &c. Judgment.

THE UNITED STATES vs. ANDREW SHOEMAKER.

The Prosecuting Attorney has a right, with leave of the Court, to enter a nolle prosequi on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offence.

A jury sworn in a criminal case may be discharged by the Court, under any sudden and uncontrollable emergency, and such discharge is no bar, even in a capital case, to another trial.

But after the jury are impaneled, and witnesses sworn, the prosecuting attorney has no right to enter a nolle prosequi, because the evidence is not sufficient to convict.

Such an abandonment, by the prosecuting attorney, is equivalent to a verdict of acquittal.

The District Attorney appeared for the plaintiffs, and Messrs. *Gatewood* and *Fields* for the defendant.

OPINION OF THE COURT. .

At the last term the defendant was indicted for feloniously taking letters from the mail, he having possession of it as carrier, which contained bank notes, &c.

The jury were impaneled, and witnesses sworn, when the prosecuting attorney abandoned the prosecution, and entered a nolle prosequi on the indictment.

Two points are raised for consideration and decision in this case.

First: Had the prosecuting attorney a right to enter a nolle prosequi in this case.

Second: Does such an abandonment amount to an acquittal of the defendant.

There can be no doubt that, before the trial is gone into, the prosecuting attorney has a right, under leave of the Court, to enter a nolle prosequi on an indictment, and such entry is no bar to a subsequent prosecution for the same offence. But, in the case under consideration, the defendant having pleaded not guilty, a jury were sworn to try the issue.

That a court may discharge a jury, in a criminal case under peculiar circumstances, after they are sworn and have heard all the evidence, is well settled in the courts of the United States.

In the case of the *United States v. Coolidge*, 2 Gallison, 364, the Court decided, that they had power to discharge the jury impaneled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice; and that there was no exception of capital cases. And in the case of the *United States v. Josef Perez*, 9 Wheat. 579, the Supreme Court say, "that courts of justice have the authority to discharge the jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; and that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon his trial."

But there was no discharge of the jury by the Court in this case. Nor does it appear, from the record, that the prosecution was abandoned on account of any defect in the indictment. The usual mode of taking advantage of such defect is, either by a motion to quash, or, in arrest of judgment; but the Supreme Court have said, 12 Wheat. 460, that the sufficiency of the indictment, in the discretion of the Court, may be discussed and decided during the trial before the jury.

In 1 Chitt. Cr. Law, 631, it is said that it would be absurd to suppose that after evidence given, the prosecutor might be allowed to withdraw a juror merely because the proof would not amount to conviction. And it would seem to be equally unreasonable to allow a nolle prosequi to be entered, because the proof was not sufficient to convict.

In the case of the *Commonwealth v. John Wade*, 17 Pick. 395, the Court say—there are some stages of a trial in which the right to enter a nolle prosequi clearly ceases; as after a verdict of manslaughter on an indictment for murder; in others, a question might be made, as after the evidence is closed, or after it is summed up to the jury. In some cases, it would seem, the cause must be taken from the jury of necessity; as if the jury can not agree, or, if one of them be taken ill, &c. And they say the case under consideration was one where there was no necessity, no unforeseen cause of delay, no accident, no mistake, no extraordinary exigence. It was an ordinary case of a good indictment in point of form, but a failure in the proof. And they decided that the prisoner was entitled to a verdict of acquittal.

In the case of the *State v. Davis*, 4 Blackford, 345, the Court held that it was not error in the Circuit Court to refuse permission to the prosecuting attorney to enter a nolle prosequi after evidence had been heard in the cause.

The fifth article of the amendments to the Constitution of the United States declares, that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb.

Under this provision it has been held, in the case of the *United States v. Gibert et al.* 2 Sumner, 19, by the Circuit Judge, that, in a capital case, a new trial is prohibited where a verdict of guilty is rendered, as it would place the defendant a second time in jeopardy. With this view I do not concur,

but it was taken by a most able and learned judge, and shows great strictness in criminal proceedings.

The offence charged against the defendant does not subject him, if convicted, to the loss of either life or limb, and it is not, therefore, within this provision of the constitution; but the rights of the defendant are equally guarded by established principles.

Where the judgment is arrested for some defect in the indictment, it is admitted that the defendant may be prosecuted a second time for the same offence. And that a discharge of the jury by the Court, under some sudden emergency, constitutes no bar to another trial.

In the first case the defendant could not be said to have been in jeopardy, as the indictment was radically defective; and, in the second case, from the sudden indisposition of a witness, a juror, the Court, or an irreconcilable difference of opinion among the jurors, having occurred, over which neither the Court nor the parties could exercise any control, the discharge of the jury became indispensable. The trial could not proceed; no verdict could be rendered; and, for this reason, the defendant, in such a case, was not considered in jeopardy. The fault was not with the prosecuting attorney, nor with the defendant, and the circumstance was so imperious as to lead to a failure of public justice, unless the Court should discharge the jury.

Formerly it was held that this discharge of the jury might be entered with the consent of the defendant, but his consent is not now deemed necessary.

The jury were not discharged by the Court in the case under consideration. No emergency occurred which called for, or authorized, such discharge. The prosecution was abandoned by the United States, which left the jury nothing to try, and they were, consequently, dismissed.

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The ground on which the prosecution was abandoned does not appear on the record. The jury were regularly impaneled and sworn to try the issue; witnesses were sworn, and then a nolle prosequi was entered. From the record it would seem probable that the prosecution was abandoned, because of the insufficiency of the evidence to sustain it. But whether this or some other was the true ground, the question arises as to the right of the prosecutor, under the circumstances, to enter a nolle prosequi.

If the prosecutor have this right, at what stage of the trial must it be exercised? May he abandon the prosecution after the jury shall have returned into court prepared to render their verdict, or on the close of the evidence on both sides, or on its close by the United States; or must the entry be made before any evidence is heard, and immediately after the jury are sworn? If the right to abandon the prosecution be in the prosecuting attorney, with the view of commencing it de novo, it is not perceived on what principle its exercise can be limited. If it exist it would seem to follow that it may be exercised at the discretion of the attorney who represents the government. This would lead to endless vexations in the prosecution of criminal cases.

The first trial might be considered an experiment to draw forth the evidence in the case, and ascertain if it be insufficient, whether, on another trial, it might not be made strong enough to convict. Such a course would not be tolerated in a civil cause, much less in a criminal one.

Nor could this right be safely exercised under the discretion of the Court. What shall govern this discretion? Shall the Court determine, on hearing a part of the evidence, whether or not the defendant is guilty, and permit the prosecuting attorney to enter a nolle prosequi or not, as they shall think the ends of justice require.

The discharge of a jury in a criminal case, on the ground of a necessity which could neither be foreseen nor controlled, imposes no hardship on the defendant of which he has a right to complain. He, alike with the government, must submit to the law of necessity, which, of all other laws, is the most inexorable.

But the entry of a *nolle prosequi* is imposed by no necessity. It may be a matter of discretion, or, of policy; a discretion founded upon no fixed principle, or guided by no known rule; or a policy which may have for its object the oppression and conviction of the defendant.

An abandonment of the prosecution, before the defendant is put upon his trial, is the undoubted right of the prosecuting attorney; but after the trial has been commenced the relation of the defendant to the case is materially changed, and this must, to some extent, control the power of the prosecutor. He, it is true, may, in effect, abandon the prosecution by failing to call witnesses, but, it would seem that, he can not do so to the prejudice of the defendant. He can not abandon it in form, and afterwards renew the same charge.

The prisoner stands charged as a culprit, but the law is jealous of his rights, and shields him from oppression. However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case, he has a right to their verdict, unless some inevitable occurrence shall interpose and prevent the rendition of a verdict.

Before he goes into trial the prosecutor should see that his witnesses are in attendance, and that he is prepared to try the issue.

If, then, the prosecuting attorney had no right to enter a *nolle prosequi* after the jury were sworn, how does such an entry affect the defendant?

If the defendant had a right to claim a verdict, and did not receive a verdict of acquittal on account of the abandonment of the prosecution by the United States, it is contended that such abandonment should not operate to his prejudice.

The plea of *autrefois acquit* consists of matter of record, and matter of fact. Of record, the indictment and acquittal of fact, that the defendant is the same person, and that the offence is the same.

To sustain this plea the first indictment must have described the offence with legal certainty. If, in this respect, the indictment be essentially defective, it can constitute no bar. The indictment, in this case, appears to be technical, and, on its face, is subject to no fatal exception. And, it is admitted, that the defendant in the second indictment is the same person named in the first, and that the offence is the same. This admission renders an inquisition to ascertain the facts unnecessary.

If a defendant be acquitted on the misdirection of the Judge, still his acquittal may be pleaded. 2 Co. Inst. 318,

To sustain a plea of a former acquittal there must be a judgment on the verdict of not guilty. 2 Hale, P. C. 243, 246. Hawk. 6, 2. C. 35b, 6. 1 Chitt. C. L. 457. 4 Co. Rep. 44, 45.

The record introduced to support the plea in this case, after stating the appearance of the prosecuting attorney, and the defendant, in proper person, "jury were called, who were elected, tried, and sworn, to try the issue joined between the United States and the defendant, and true deliverance make according to law, and evidence. Whereupon, the said plaintiffs, by their said attorney, say, that they will no further prosecute their said indictment against the said defendant. It is, therefore, considered by the Court that the defendant go hence without day."

Here is no verdict of acquittal, and, consequently, no judgment on the verdict. The plea of a former acquittal is not, therefore, technically sustained. But there is a judgment in favor of the defendant, that he go without day; and this necessarily followed the abandonment of the prosecution. Can this judgment be considered as substantially sustaining the plea? On this point I confess that I entertain strong doubts. From the limited access to books, which I have had at this place, I can find no case in point. In the cases referred to in 17 Pick., and 4 Black., the Court decided that, where the jury were sworn, and some evidence heard, the prosecuting attorney had no right to enter a nolle prosequi, and that the defendant was entitled to a verdict. It is not said, however, in either of these cases, what the effect to the defendant would have been, had the nolle prosequi been entered.

The Commonwealth v. Cook, 6 Serg. & Rawl. 577, the Court decided that a discharge of the jury once sworn, in a criminal case, was an acquittal of the defendant.

The case must be considered on principle, if the point has not been decided.

It is a rule in criminal proceedings that nothing shall be done, within the discretion of the Court, to the prejudice of the defendant. And, hence, in some instances, where his interests may, possibly, be injuriously affected by an order, his consent is necessary. So regardful of his rights are the Court, that they will not encourage, or, indeed, suffer him to assent to that which is manifestly to his prejudice. In some respects the Court are said to be the counsel of the prisoner.

If the Court instruct the jury that it is essential to prove the offence was committed on the day laid in the indictment, and on this ground the defendant be acquitted, the acquittal may be pleaded. 2 Hale, 247.

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In the case under consideration the prosecuting attorney had no right to enter a formal abandonment of the prosecution; and, from this, it follows that the defendant had a right to a verdict. There is no defect apparent on the face of the indictment. But the prosecution was formally abandoned, which left the jury nothing to try. And if this proceeding shall not be regarded as a verdict of acquittal, is not the defendant manifestly prejudiced? Was he not in peril? The *nolle prosequi* was entered without the consent of the defendant, and against his remonstrance; and it was entered against his rights, and without power, or right, by the prosecutor. On principle, therefore, we feel bound to say, that the proceeding must be considered equivalent to a verdict of acquittal, and, as such, with the judgment of the Court thereon, is a bar to the present indictment.

JONATHAN THOMPSON vs. COOK AND SPALDING.

A general averment of the citizenship of the plaintiff, sufficient.

Where a note has been assigned by a firm, it is unnecessary for the assignee to aver, and prove the names of the persons who compose the firm.

This is the rule at common law, and there is nothing in the act of Congress, in regard to assignments, or in the limited jurisdiction of this Court, which should change the rule.

Where a note is made payable at a particular place, the declaration need not aver that the note, when due, was presented at such place for payment.

This cause was argued by Mr. ——— for the plaintiff, and by Mr. *Arnold* for the defendant.

OPINION OF THE COURT.

THIS action was brought on a promissory note, given by the defendants, to John W. Taylor & Co., and by them assigned, under the same name, to the plaintiff.

The defendants, having filed a special demurrer, take several exceptions to the declaration.

The plaintiff, in the declaration, is stated to be a citizen of the State of New York; but, it is objected, that there is no averment of his being a citizen, at the time the suit was commenced. That it does not follow, from his being a citizen of New York at the time the declaration was filed, that he was a citizen at the time the writ was issued.

In this respect, the declaration is in the usual form, and we think it is good. In a late case, the Supreme Court decided that, if the citizenship of the plaintiff appeared in any part of the pleadings, it is sufficient. In that case, (*Bradstreet v. Thomas*, 12 Peters, 64,) the citizenship of the plaintiff was alleged in the joinder to the demurrer, and, under the circumstances, it was held good.

One of the defendants is alleged, in the declaration, to be a citizen of Illinois, and the other of Missouri. The writ was served only on the citizen of Illinois.

It has often been ruled that, where there are several plaintiffs and defendants, the Court must have jurisdiction, as between each of the plaintiffs and defendants. In the case under consideration, the plaintiff being a citizen of New York, the suit being brought in the State of Illinois, the Court can take no jurisdiction against the defendant, who is a citizen of Missouri. But as this defendant is not, in fact, a party to the suit, the process not having been served on him, the act of Congress of the 28th Feb. 1839, 1st section, covers the case, and authorizes the suit against one of the parties to the note. And,

indeed, without the provisions of this statute, the defendant being liable to pay the note, and the other party not being, in any way, prejudiced by the proceeding, a judgment might have been entered against the party before the Court. But the late law provides for the case, and removes all doubt on the subject.

It is also objected, that the declaration does not show who compose the firm of John W. Taylor & Co., the payees and indorsers of the note. And, it is insisted, that this is material, in order to give jurisdiction to the Court.

Where an individual derives his right through an assignment of a firm, as in this case, it is never necessary for him, at common law, to state, in his declaration, the names composing the firm.

In this case the declaration alleges that John W. Taylor & Co. are citizens of the State of New York, and no necessity is perceived for a more specific allegation.

The defendants promise to pay John W. Taylor & Co.; and, by the same name, the note is indorsed to the plaintiff. Why should he be held bound to ascertain and set forth, in his declaration, the individuals who compose the firm? If the note had been transferred by ten or twenty firms, it would be just as necessary to state the individuals who compose each of them, as in the present case. This would not only establish the rule in this Court, different from that which exists in other courts, but it would materially affect the negotiable character of bills or notes.

There is nothing in the act of Congress referred to, or in the limited jurisdiction of this Court, which should change the rule. It is always in the power of the defendant to plead to the jurisdiction of the Court, and take advantage of any fact which may exist, going to show a want of jurisdiction.

In the last place, it is objected that the note, upon its face, is payable at the State Bank of Illinois, and the declaration contains no averment that, when due, it was presented to the bank for payment.

As matter of description, it is proper to state where the note is payable; but the law is now well settled, that it is not necessary, where a note is payable at a particular place, to state, in the declaration, that a demand of payment was made at such place.

There are some conflicting decisions on this point in this country; but the weight of authority is, that no demand need be made. And, until lately, in England, there was no question which produced more conflicting decisions, than this one. The King's Bench decided one way, and the Common Pleas another; and this conflict continued until the point was decided, in the House of Lords, against the King's Bench, that a demand of payment, at the place where the note was made payable, was essential to the right of action on the note.

No one, it is presumed, can read the opinion given in the House of Lords, and not be struck with the forcible reasoning, and superior ability, on the side of the minority in the house. Lord Eldon was in favor of the decision given; but eight of the twelve Judges were against it, and in favor of the decision made by the King's Bench. And, it does seem, that the masterly views presented by the eight Judges, are conclusive on the subject. The case was *Rowe v. Young*, 2 Brod. & Bing. 180.

This decision of the House of Lords does not seem to have been satisfactory, as, immediately afterwards, an act of Parliament (1 & 2, G. 4, ch. 78) was passed, which substantially sustained the doctrine of the King's Bench.

Where a note is payable at a particular place, as in the present instance, at a bank, the maker of the note may show a de-

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posit of the money to meet the note, or a readiness to pay, had a demand been made. And this seems to be a proper subject matter for defence. Why should the holder of the paper be required to make a demand of payment, at the place designated, any more than a demand of the maker, at his usual place of residence, where no place is named?

This question, in the case of *Wallace v. McConnell*, 13 Peters, 144, was fully considered, and decided by the Supreme Court. It is, therefore, no longer an open question before the courts of the United States.

The demurrer is overruled; and, there being no further defence, judgment is entered for the plaintiff on the note.

MOSES ROGERS vs. WILLIAM LINN.

The assignee, who sues in his own name, must show, to give jurisdiction to the Circuit Court, that his assignor, at the time of the assignment, might have brought the suit in his own name.

The Circuit Court having only a limited jurisdiction, it must be shown in the pleadings.

Messrs. *Cowles* and *Krum* for the plaintiff, and Messrs. *Davis* and *Forman* for the defendant.

OPINION OF THE COURT.

A DEMURRER is filed to the declaration in this case, on the ground that the plaintiff has brought the action as assignee, and does not aver or state, in his declaration, that his assignor might have brought suit in his own name, in this Court, at the time of the assignment. This is a fatal defect in the declaration. The jurisdiction of this Court is limited; and it has often

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been decided that the plaintiff must show, in his pleadings, that the case is within their jurisdiction.

By the 11th section of the Judiciary act of 1789, the assignee of a negotiable instrument can not maintain a suit in the Federal Court in his own name, unless the assignor could also have sued, at the time of the assignment, in the same court. And this must appear in the pleadings, or the exception will be fatal if raised by demurrer, on a motion in arrest of judgment, or on a writ of error.

In a suit by the indorsee of a promissory note against the drawer, it must appear on the record, that the Circuit Court would have had jurisdiction, as between the original parties to the instrument, or it will have none over the case. *Turner's Administrators v. Bank of North America*, 4 Dall. 8. *Montalet v. Murray*, 4 Cranch, 46.

The demurrer is sustained; but, on motion, leave is given to amend the declaration.

ANDREW FONTAINE, Assignee, vs. FRANCIS ARESTA.

On a bond, payable by instalments, debt cannot be sustained until they shall all become due.

But if the payment be secured by a penalty, debt may be brought.

Where there is no penalty covenant is the proper action for the instalments on a bond; or assumpsit, if the instalments be due by a simple contract.

This case was argued by Mr. Logan for the plaintiff, and by Mr. Thomas for the defendant.

OPINION OF THE COURT.

THIS action of debt was brought on an instrument, under seal, for the payment of a certain sum, as principal, not yet

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due; and the payment of the interest annually. The defendant filed a special demurrer, which raises the question, whether an action of debt for the interest can be sustained before the principal becomes due.

The rule seems to be well settled that debt will not lie for money, payable by instalments, until they shall all become due, unless the payment be secured by a penalty. 1 Chitt. pl. 129. *Rudder v. Price*, 1 H. Bl. 547. 2 Saund. 303, n. 6. 3 Co. 22, a. Selw. N. P. 531, n. Bac. Abr. 669. 3 Black. 168.

Where a sum of money is payable by instalments, and the payment is secured by a penalty, debt may be brought for the penalty. Bac. Ab. 699, debt. B.; Com. Di., F.

In 1 Binn. 152 the Court held, that where the condition of a bond was for the payment of interest annually, and the principal at a distant day, the interest might be recovered, before the principal was due, by an action of debt on the bond. In this case the payment of the principal and interest was secured by a penalty.

Where there is no penalty in the bond, payable by instalments, covenant is the proper action to recover the instalments as they shall become due. If the instalment be due on a simple contract, assumpsit is the proper action.

This is a technical rule, as applied to the action of debt, but it seems to be too well established to be disregarded. The demurrer must be sustained.

Joseph Jacquette v. Daniel Hugunon.

JOSEPH JACQUETTE vs. DANIEL HUGUNON.

Nil debet cannot be pleaded to an action on a judgment.

The judgment is as final and conclusive in every other State, as in the one where it is entered.

The plea of nul tiel record brings before the Court the validity of the judgment and the description of it, as set forth in the declaration.

A release, the statute of limitations, or payment, may be pleaded.

Mr. Butterfield appeared for the plaintiff, and *Mr. Spring* for the defendant.

OPINION OF THE COURT.

THIS suit is brought on the record of a judgment obtained in the State of New York. The defendant filed the pleas of nul tiel record and nil debet, and the question is whether the latter plea can be pleaded to an action on a judgment.

Under the constitution and laws of the United States a judgment obtained in one State has the same effect in every other State. It is conclusive of the subject matter of controversy, and no plea can be filed which contradicts the record.

The statute of limitations of the State where the suit is brought may be pleaded, also a release or payment, but the plea of nil debet which controverts the judgment, cannot be pleaded. *Armstrong v. Carson's Ex'r.*, 2 Dall. 302. *Mills v. Duryee*, 7 Cranch 481. *Hampton v. McConnel*, 3 Wheat. 234. *McElmayle v. Cohen*, 13 Peters 324.

The plea of nul tiel record is the proper and the only plea that brings before the Court the validity of the record, and the description of it as set forth in the declaration. The demurrer to the plea of nil debet, considered as filed, is sustained.

Vincent L. Bradford v. Levi Jenks et al.

VINCENT L. BRADFORD vs. LEVI JENKS et al.

A receiver in the State of Michigan, appointed under the act which provides for the voluntary dissolution of bank corporations, &c., stands in the relation of the assignee of an insolvent debtor.

And if such receiver sue in the courts of the United States he must show that the Court could have taken jurisdiction, as between the defendants and the bank.

Though the note, on which the suit be brought, be payable to the bank or bearer, the receiver can not sue as the bearer of the note, as he does not hold it in that right.

He does not own, except as trustee, the property in the note, and did not receive it in the ordinary course of business.

A note payable to a payee, named, or bearer, may be sued for, by any person who received it in the course of business, in his own name, in the courts of the United States, without noticing the payee named.

The promise to pay, is as much to the bearer, as to the person named.

Quere.—Whether the assignee of an insolvent can sue, in his own name, in a foreign jurisdiction.

This cause was argued by Mr. *Goodrich* for the plaintiff, and by Mr. *Arnold* for the defendants.

OPINION OF THE COURT.

THE plaintiff, who is a citizen of Michigan, in his declaration, states that the defendants, on the 14th of February, 1838, at Niles, Berrien county, State of Michigan, gave their note, by which they promised to pay the President, Directors & Co. of the Berrien county bank, or bearer, three thousand dollars, at their bank in Niles, Berrien county, Michigan; the two first as principals, and the others as securities, for value received, twelve months after date. And that afterwards, at Niles, aforesaid, to wit., 1st January, 1839, the said promissory note came into the hands and possession of the said plaintiff, for a good and valuable consideration, by him then and there paid, &c.

The defendants pleaded, that the note did not come into the hands of the plaintiff for any good or valuable consideration, by him then and there paid; nor did the said plaintiff become the lawful bearer and holder of said note, in manner and form, &c. And they say, after the said note became due, to wit., 1st March, 1839, to wit., at Berrien, in Michigan, such proceedings were had; that the said plaintiff became, and was appointed, the receiver of the Berrien county bank, who was then and there appointed by law to take charge of the effects of said bank, and authorized to receive and collect the same; that the note was a part of the effects, and came to the plaintiff's hands as receiver, and not otherwise.

And the defendants aver, that the stockholders of the bank are not all residents of the State of Michigan; and that some of them are citizens of the State of Illinois, the same State of which the defendants are citizens, and they pray judgment, &c. Demurrer to plea, &c.

The act of Michigan, referred to, was passed the 15th April, 1839, and is entitled "an act to provide for the voluntary dissolution of corporations, and to prescribe the duties of receivers in chancery, in certain cases," &c.

The 10th section provides that "such receivers, when appointed, shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security, hereinbefore required, and shall be trustees of said estate for the benefit of the creditors of such corporations, and for the benefit of its stockholders."

And the 25th section provides, "whenever a receiver of the property or effects of a corporation has been appointed before its dissolution, or afterwards, new suits may be brought, and carried on by such receivers, either in their own names, or in the name of the corporation for which they shall have been appointed; but no new suit shall be brought in the name of a cor-

Vincent L. Bradford v. Levi Jenks et al.

poration after it shall have been dissolved, or after the expiration of its charter."

The demurrer admits the truth of the plea; but the plaintiff insists that the note, on which the action is brought, is made payable to bearer, and that the plaintiff has a right to bring the action in his own name, having come lawfully into the possession of the note, without stating from whom he received it.

In the case of *The Bank of Kentucky v. Winter and others*, 2 Peters, 326, the Court say: "The other point has relation to the form of the bills, which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But this, also, is a question which has been considered and disposed of in our previous decisions. This Court has uniformly held, that a note payable to bearer, is payable to any body, and not affected by the disabilities of the nominal payee."

The promise is in the alternative, to pay the person or corporation named, or bearer; and the obligation to pay the bearer, is as strong as to pay the payee, named in the note. This being the original terms of the note, it is unnecessary to aver or prove any assignment or transfer of the note to the holder. It is proper that he should set out, in his declaration, as the plaintiff has done in this case, that the note came into his hands for a valuable consideration.

The possession of the note is prima facie evidence that the holder received it in the course of business; and the manner of receiving it, or the consideration paid, need not be proved, unless it shall become necessary from the plea or defence set up by the maker of the note.

But, in this case, the plea negatives the presumption, by stating that the plaintiff came into the possession of the note, not

in the course of business and for a valuable consideration, but as the receiver of the bank, acting under a special law, and for the benefit of the creditors and stockholders of the bank. He acts as trustee, and not in his own right. The property of the note is vested in him, in his fiduciary character only, the same as an administrator, or the assignees of a bankrupt.

Can he, then, be considered as the bearer of the note, in a commercial sense of the term? which is the light in which he must be considered, as having a right to bring the action in his own name. The note, being payable to bearer, passes by delivery; and, any payment made to the bank, or to any prior holder, can not be good, unless made to the holder of the note, and a notice of such payment be given to the person who subsequently receives the note, in the course of business, and before he receives it.

In this case, it will not be contended that the defendants may not show a payment to the bank, or any matter of offset, which might be pleaded, if the suit were brought in the name of the bank. From this it appears, that if the suit may be brought in the name of the receiver, he can not be treated as having the right of property in the note, but as a mere agent or trustee for the bank.

An executor or administrator can not sue, as such, beyond the jurisdiction which confers his power, unless the laws of the foreign jurisdiction shall authorize him to do so. And why does not this principle apply to the receiver in this case? There seems to be a strong analogy in the two cases.

Under the 11th section of the Judiciary act of 1789, no assignee can bring an action in the Federal courts, unless, as between his assignor and the defendant, the court had jurisdiction. And this must be shown in the declaration. 9 Wheat. 537.

This note came into the possession of the plaintiff, not in the course of business and for a valuable consideration, but as assignee, in the manner stated in the plea. And, this being the case, a question arises, whether the declaration is not defective, in not setting forth the assignment.

A case in all respects analogous to the one under consideration, is, where an insolvent assigns his effects for the benefit of his creditors. The legal right to the property is vested in the assignee, and he may sue in his fiduciary character.

In the case of *Sere et al. v. Pital et al.*, 6 Cranch, 332, the Supreme Court decided, that a general assignee of the effects of an insolvent, can not sue in the Federal courts, if his assignee could not have sued in those courts. This conclusion is arrived at by the Court, on a particular examination of the language and object of the act of Congress, which applies to the subject.

In the above case the plaintiffs were aliens, but the insolvent assignor was a citizen of Louisiana; and, as he could not sue in the Federal court of Louisiana, the Court held that his assignees could not.

In this respect, a distinction is made between the assignees of an insolvent, and executors or administrators; for the latter may sue or be sued, if they are citizens of a different State from the other party, although their testators, or intestates, had not this right. 8 Wheat. 642.

No distinction can be drawn between the duties and powers of the plaintiff as receiver, or assignee of the bank, and the assignee of an insolvent, which shall place them on different principles in regard to the right of suing in the Federal courts. They are both assignees, in law, of the effects of insolvents, and their duties are substantially the same. From this view, the authority cited from Cranch, must be conclusive.

The plaintiff can only sue as assignee; and he attempts to maintain the action in his own name, as the bearer of the note,

to whom the promise of payment was originally made. We think this can not be done, in the face of the facts stated in the plea.

The demurrer reaches the declaration, and, taking it, in connection with the plea, it appears that the plaintiff has mistaken the right by which he may sue; and that, if the suit be brought by him as assignee, it can not be maintained, as a part of the stockholders of the bank are citizens of Illinois, and were so, when the action was commenced.

We are also inclined to think, though it is unnecessary to decide the point, that if the assignee bring a suit for the benefit of the bank, in any other State than that of Michigan, he must bring the suit in the name of the bank. It is clear that, in seeking a remedy in a foreign jurisdiction, he must seek it in pursuance of the recognized forms of procedure in such jurisdiction; and, if there be no authority under which a foreign assignee of an insolvent can sue in his own name, the name of the assignor must be used. 2 Peters' Di. 685.

The demurrer to the plea is sustained.

THE UNITED STATES vs. S. N. WINCHESTER.

Where an act of Congress requires an oath to be administered, such oath under the usage of the proper department of the government, may be administered by a State officer having power to administer oaths.

Parol proof of the contents of a written agreement, cannot be given in evidence, where the contract is in the hands of the opposite party, unless notice be served on the party or his attorney to produce it.

The rule of evidence is the same in criminal as in civil cases.

This cause was argued by Mr. *Forman*, the Prosecuting Attorney, for the plaintiffs, and by Mr. *Spring* for the defendant.

The United States v. S. N. Winchester.

OPINION OF THE COURT.

THIS is an indictment for swearing falsely in regard to the defendant's right of pre-emption.

The indictment sets forth that the defendant swore, before a justice of the peace, who, it is alledged, had full power to administer the oath—"that sometime before the 2nd February, 1838, he entered upon the northwest quarter of section No. 15, town. 38, north, of range 14, east of the third principal meridian, in his own right and exclusively for his own use and benefit. And that previous to the 22d February, 1838, he, the said Winchester, had built a dwelling house on said land; and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure to the use of," &c.

The act of June 22d, 1838, entitled an act to grant pre-emption rights to settlers on the public lands, provides "that before any person, claiming the benefit of this law, shall have a patent for the land which he may claim by having complied with its provisions, he shall make oath, which, with the certificate of the person administering it, shall be filed with the register of the land office, &c., that he entered upon the land which he claims in his own right and exclusively for his own use and benefit, and that he has not directly nor indirectly made any agreement or contract in any way or manner, with any person or persons whatever, by which the title he might acquire from the government of the United States should inure to the use or benefit of any one except himself, or to convey or transfer the said land or the title which he may acquire to the same, to any other person or persons whatsoever at any subsequent time; and if such person, claiming the benefit of this law, as

aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties for perjury," &c.

It is objected that the requirement of the law of Congress, of the applicant for a pre-emptive right to make oath, does not authorize a justice of the peace, as a State officer, to administer the oath. That to subject the defendant to the penalty of the statute, the oath must be made before some one authorized to administer oaths by the Federal Government.

Before the decision of the case of *The United States v. Bailey*, 9 Peters 238, I should have thought this argument forcible, if not conclusive. But under that decision, it seems to me, there can be little or no doubt on the subject.

In that case an oath was not specially required by law, but under the usage of the Treasury department it was required, and the right to administer it by a justice of the peace was recognized by the department. And this the Court held was sufficient to convict the defendant for false swearing under the statute.

In the present case the statute requires an oath to be made, and it is not denied, but admitted, that under the instruction of the Treasury department this oath was usually administered by a justice of the peace. I cannot, therefore, overrule the evidence of the oath, but it must be received.

In the further progress of the cause it appeared that a contract, in writing, had been entered into by the defendant in regard to this land; the contents of which contract the prosecution offered to prove, with the view of showing the falsity of his oath.

To this evidence the defendant's counsel objected, because the agreement was in writing. The prosecution then showed that the paper had been delivered up to the defendant, and was then in his possession. This was admitted by the defendant's counsel, who alledged they had received no notice to produce

the paper, and that it was in fact at Chicago, more than a hundred miles distance from the Court.

The Court held that parol evidence of the contents of the contract could not be given in evidence, unless a reasonable notice to produce it had been served on the defendant or his counsel.

The rules of evidence are the same in criminal cases as in civil. The writing in question is the most important evidence in the case. It shows, it is suggested, that the defendant had disposed of the pre-emptive right in question, which contradicts his oath. Now if this agreement be so important, it should be produced; or at least before parol proof of its contents be given, the prosecution should, by a notice, have required the defendant to produce it. And if after a reasonable notice he should fail to bring it into Court, he cannot complain that evidence of a secondary nature is received.

No case could well be imagined which more forcibly shows the wisdom and safety of the rule, as to the admission of secondary evidence, than the one under consideration. We are clearly of the opinion that the evidence offered is inadmissible. 1 Phil. Ev. 389. 2 Term 201, *n.* 1 Term 203, *n.* 2 Stark. Ev. 357. 3 Term 306. Leach 214.

The jury, on this evidence being rejected, found a verdict for the defendant.

DUNHAM SPAULDING vs. JOHN EVANS.

Where a note is given to A B, C D, E F, or G H, either of the promisees may bring the action in his own name.

The promise to pay is to either of the promisees, in the alternative.

In such a case it is not necessary to set out the note in terms in the declaration, but it is sufficient to state it according to its legal effects.

This cause was argued by Messrs. *Cowles and Krum* for the plaintiff, and by Mr. *Logan* for the defendant.

OPINION OF THE COURT.

THIS suit is brought upon the following note: "Chicago, 24th June, 1836. Twelve months after date I promise to pay Jam-
eson Samuels, H. N. Davis, Elias T. Langham, or Dunham
Spaulding, five hundred and seventy five dollars, being for
seven lots in Bellfontaine. Value received." Signed John
Evans.

The action is brought in the name of Dunham Spaulding, and the note is described in the declaration as given to him, no reference being made to the other promisees.

On the trial the note was objected to on the ground that it is not set out according to its tenor or its legal effect, in the declaration.

The defendant promises to pay either of the promisees. The disjunctive applies so as to give this effect to the instrument. It would seem, therefore, to follow that either of the promisees may bring the action in his own name. And in this case it would not be necessary to set out the note in full, but only so much of it as to show its legal effect.

Mr. Chitty says, (1 Vol. Pleading 10) "where the contract was made with several persons, whether it were under seal or in writing, but not under seal or by parol, if their legal interest

were joint, they must all, if living, join in an action in form ex contractu for the breach of it, though the covenant or contract with them was in terms joint and several."

In 1 Saund. 153, *n.* 1, it is said though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. Dyer 337. 2 Mad. 82. 3 Mad. 262, 263. Bull. N. P. 157. 2 Camp. 190.

In a note, Chitty, as above cited, adds, "where a bond is joint in form only, but several in substance, an action may be maintained in the name of the several obligees. But it seems if he can maintain such action on the bond he must set forth the bond truly, and then by proper averments show cause of action to himself alone clearly embraced within the condition of the bond.

In 2 John. cases 374, it is laid down that when one of several obligees, covenantees, &c., having a joint legal interest in the contract, dies, the action must be brought in the name of the survivors; and the executor or administrator of the deceased must not be joined nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract; and the executor must resort to a Court of equity to obtain from the survivor the testator's share of the sum recovered; but if the interest of the covenantees were several the executor of one of them may sue though the other be living. Saund. 153, *n.* 1. Burr. 1097. 1 Chitt. R. 19.

Where two or more persons sign a joint and several obligation, the obligee must sue one or all of them. 1 Saund. 291, *a.* 3 Term 382. Partners are liable jointly and not severally. 18 John. 459. 1 Wend. 524.

A declaration is good if it state such parts of the contract of which a breach is complained, or, in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues; and it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. 4 Taunt. 285. 13 East. 18.

The legal effect of the contract is all that need be stated. 1 Chitt. Pl. 385.

On a joint and several note either of the promissors may be sued, and in the declaration it is not necessary to notice the other party. 1 Chitt. Pl. 116. Chitt. on Bills, 346. 4 Camp. 34. 5 Coke 6. 1 Barn. & Al. 224.

The declaration upon a note stated that the defendant and another made their note by which they jointly or severally promised to pay; and upon error, after judgment by default, Lord Mansfield said, "if *or* is to be considered in this case as a disjunctive, the plaintiff is to elect, and by the action he has made his election to consider the note as several; but in this case it is synonymous to *and*; both and each promise to pay. Judgment affirmed."

In an action against one of several makers of a joint and several promissory note, the describing it as the separate note of the defendant, without noticing the other parties, is no variance. 1 Saund. 291. 2 Chitt. Pl. 581.

A note signed by the defendant alone, but purporting in the body of it to have been made by the defendant and another person, was declared upon as the several note of the defendant; and it was agreed that it might be declared on according to its legal operation. Burr. 322. 2 Camp. 308.

The promise to pay, in the note under consideration, is to either of the promisees, and this being the legal operation of

the instrument, it is only necessary to alledge the promise as made to the promisee, who brings the action.

It is insisted, if the action can be maintained in the name of the plaintiff, it is necessary to set out the note in full to enable the defendant to show payment to either of the promisees. That it not being an instrument under seal oyer cannot be craved, and that it is, therefore, necessary for the plaintiff to set out the note for the benefit of the defendant.

It is true oyer cannot be technically prayed of this note, but it is not perceived why the rule to declare on an instrument, according to its legal effect, may not apply in this case as well as in every other where the action is brought on a contract not under seal.

Where an action is brought against one of two or more makers of a promissory note, no notice need be taken of the other parties, and here the inconvenience complained of would exist, the same, as in the case under examination.

If the defendant has paid the note to either of the promisees it is good, and he may prove this as readily as he could prove payment by a co-promisor, if sued on a joint and several note.

The declaration sets out the note according to its legal effect, and it cannot be rejected as evidence on the ground of variance. The note was admitted and judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1840.

DOE *EX DEM* COPPERTHWAIT AND DUNLAP *VS.* SAMUEL McCORD.

THE defendant served a notice on the plaintiff's attorney, to furnish him with copies of all deeds, records of judgments, and decrees in chancery, and all other evidence of title intended to be used as evidence on the part of the lessor of the plaintiff.

The statute, under which this notice was served, requires "the plaintiff, or his attorney, to deliver to the defendant, or his attorney, if demanded, a copy of the account, or bill of particulars, of the demand, or a copy of the bill, bond, deed, bargain, contract, note, instrument, or other writing, whereon the declaration is founded, or which he intends to offer in evidence at the trial." And, in the succeeding section, it is provided, that if the plaintiff, or defendant, shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence at the trial, the original, of which a copy has been refused.

Under this act it seems it has not been the practice, in the State Courts, to give the notice in the action of ejectment. But whether the act embraces the action of ejectment, has not been decided by the Supreme or Circuit Courts of the State.

Doe ex Dem Copperthwait and Dunlap v. Samuel McCord.

The uniform course of practice, under an act, goes strongly to establish the construction of it, without any express decision of the Court. As the papers required by the notice in this case have not been produced, a continuance is asked on that ground; and this, for the first time, it is believed, brings up for decision, whether the statute embraces an action of ejectment.

The language of the statute is general, and no action is excepted, but the provision would seem to apply to actions founded upon contracts, and this construction has generally, if not uniformly, been given to the act. And, we think, the intention of the legislature is effectuated by this view of the statute.

The notice, under the statute, applies as well to the defendant as to the plaintiff; and can it be supposed, that the lessor of the plaintiff, in the action of ejectment, by serving a notice on the defendant, can compel him to exhibit his title papers before the plaintiff has proved his title.

Upon the whole, we think the refusal or neglect to furnish the copies called for by the notice affords no ground for a continuance of the cause, as the statute does not authorize such a notice in an action of ejectment.

Mr. *Chase* for the plaintiff.

Mr. *Moses B. Corwin* for the defendant.

Matthews and Hopkins v. P. and E. L. Menedger.

MATTHEWS AND HOPKINS vs. P. & E. L. MENEDGER.

A judgment against one of several joint trespassers, is no bar to an action against another individual for the same trespass. ●

Having several judgments for the same trespass, the plaintiff may make his election on which one he will take out execution.

In such a case there can be but one satisfaction. The same rule applies in the action of trover, for successive conversions, by different individuals, of the same property.

The record of a judgment for the same cause can only be received in evidence to bar the plaintiffs' action, or to show that certain proceedings, under it, has operated to change the right of property.

Where a person becomes an agent to purchase wheat, or any other article, and a part of the money raised to pay for the wheat was obtained on his credit, he may withhold the delivery of the wheat, until he is indemnified.

And this is especially the rule where the principal is insolvent, and the liability of the agent to pay is about to be enforced.

A factor has a lien for all advances, on account of his principal, for balances due, or for liabilities incurred in the course of their business.

But this lien is special, and is connected with the possession of the property.

If the property be voluntarily delivered, the lien is extinguished, and can not be reasserted.

But if the delivery be special, so that the factor still retains the control of the property, the lien is not relinquished.

A jury, in the exercise of their discretion, may give interest on the value of property converted, as a part of the damages.

This cause was argued by Messrs. *Ewing* and *Stansbery* for the plaintiffs, and by Messrs. *Vinton* and *Wright* for the defendants.

OPINION OF THE COURT.

This is an action of trover, for a flatboat, and five thousand bushels of wheat, in barrels and sacks.

It was proved that the plaintiffs were merchants, in Baltimore, and in September, 1836, they made a contract with McCourtney and Read, merchants of Wheeling, to purchase for them a large quantity of wheat, which they were to have shipped to the plaintiffs by the way of New Orleans. Flat-

boats were to be used in conveying the wheat to New Orleans.

At the time of the contract the plaintiffs advanced to McCourtney and Read ten thousand dollars, in two drafts of five thousand dollars each, which were paid at maturity.

McCourtney and Read despatched an agent, by the name of Matthews, to Parkersburg, who made a contract with Chevalier, a resident of that place, to purchase the wheat at five per cent. upon the cost; McCourtney and Read to furnish the money. The sum of one thousand dollars was paid in a check by Matthews, and this Chevalier stated was sufficient, as it would enable him to make a small advance to the farmers on the purchase of the wheat.

Chevalier having purchased about four thousand bushels of wheat, called on McCourtney and Read for money to complete the payments on this purchase, who drew a bill of exchange on E. Dorsey, for three thousand dollars, payable to the order of Cowgill & Son, at some bank in Baltimore. This bill was accepted by Dorsey, and made payable to Chevalier, by the indorsement of Cowgill & Son. It was negotiated by one of the banks at Wheeling or Pittsburg, and the proceeds were paid to Chevalier, he being the last indorser.

A flatboat was sent down to Spencer's farm, near Parkersburg, by McCourtney and Read, in charge of Ford, to receive the wheat.

Shortly after this McCourtney and Read failed, and made an assignment of their effects. Before this was done they applied to Forsythe and Atturbury, of Wheeling, to become the agents of the plaintiffs, and represented that, they having advanced money to buy wheat, it was just that the wheat purchased should inure to their benefit. The proposed agency was accepted by Forsythe and Atturbury, and they despatched Matthews, as their agent, to Chevalier to inform him of the failure of McCourtney and Read, and that the wheat belonged

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to the plaintiffs; and he was, also, authorized to inform Chevalier that the bill for three thousand dollars, indorsed by him, would not be paid.

Matthews communicated this intelligence to Chevalier before the loading of the boat was completed, there having been placed on board of it between fifteen hundred and two thousand bushels. This was the first intimation received by Chevalier that the plaintiffs had any interest in the wheat. He acted as the agent of McCourtney and Read, and supposed he made the purchase on their account. There was no more wheat delivered on board the boat after the arrival of Matthews; and Chevalier directed Ford to take the boat to Gallipolis, where he would meet him.

The boat was taken to Gallipolis, and, on the arrival of Chevalier, he sold the wheat to the defendants, with the barrels in which a part of it was contained; the sacks they returned to the boat. The defendants paid to Chevalier eighteen hundred dollars for the wheat; and, owning a merchant mill, they manufactured it, and sent the flour to New Orleans, where it was sold at a good profit.

Before the sale of the wheat to the defendants they admitted that Chevalier informed them of the circumstances, but what those circumstances, thus communicated, were, does not appear from the evidence.

The defendants offered in evidence the record of a judgment, in 1839, against Chevalier, in favor of McCourtney and Read, in the State of Virginia, in an action of trover for the same wheat. And, on the record, there was an indorsement that the suit was brought for the benefit of Matthews and Hopkins.

To the introduction of this record the plaintiffs objected, as it was not between the same parties, and could for no legal purpose be received in evidence.

But the defendant's counsel insisted that it was evidence, if not as a bar to the plaintiffs' action, to show where the legal right to the wheat was vested, to influence the jury in their assessment of damages in the present action; and, also, to show that, by the judgment in Virginia, the right of property, in the wheat, became vested in Chevalier.

The form of the action in Virginia was the act of the attorney, and if he, by mistake, brought the action in the names of McCourtney and Read instead of the plaintiffs, that should not operate to their prejudice. So far as that action was concerned, the plaintiffs were bound by the acts of their attorney, as matters of form as well as to matters of substance, but beyond these they were not bound.

The indorsement on the record, that the suit was brought for the use of the plaintiffs, is a fact, which it is not perceived can be received as evidence in this case. The indorsement was the act of the attorney, and can not affect the rights of the plaintiffs in any other suit.

Nor can the Court perceive how the damages, recovered in the Virginia judgment, can influence the jury in the present case.

The parties are different, and the evidence is different; how then can the jury be guided, or in the least degree influenced, by the verdict in Virginia?

If the Virginia judgment can be received in evidence, it must be received in bar of the plaintiffs' action, or to show a change of property.

The defendants' counsel do not insist that, under the circumstances, the Virginia judgment is a bar to the present action.

To constitute a bar the judgment must not only have been for the same subject matter, but between the same parties.

Did the Virginia judgment operate to vest the right of property in Chevalier, the defendant?

That this effect must be given to the judgment, is strongly insisted on by the defendant's counsel. And if this position be sustained there is an end to the present action. For, if the right of property to the wheat was in Chevalier, his sale to the defendants can not be shaken.

How can the obtainment of the judgment operate a change in the right of property? Before the rendition of the judgment the plaintiffs had the right of property, and a demand against Chevalier for converting it to his own use; and after the judgment this demand remains, though it has assumed a different form.

A judgment against one of several joint trespassers is no bar to an action against either of the others. There is some conflict of decision on this point, but the weight of authority, and the current of modern decisions, sustain the above principle.

All joint trespassers are liable severally as well as jointly, and the rule is well established, that there may be several judgments against different individuals for the same trespass, but only one satisfaction. *Detrof v. Wright*, 2 Ohio Rep. 33. 8 Cowen, 43. 1 John. 290.

After several judgments are obtained for the same trespass, the plaintiff may make his election, on which judgment he will take out execution; and, having done this, he can not proceed on the other judgments. From this it appears that one joint trespasser can not plead in bar a prior judgment against another for the same trespass; but to be a good bar the plea must state that the prior judgment has been satisfied, or, at least, that the plaintiff has elected to take the judgment by issuing execution on it.

Where the judgment has been satisfied, which extinguishes the demand of the plaintiff, for the value of the property, the right of the property must, consequently, vest in the defendant.

He has paid its value to the plaintiff, and, in addition, perhaps, something for the manner in which the property was taken. But before this satisfaction the defendant can set up no color of right to the property, on the ground that a judgment has been obtained against him for its value.

The same rule that applies in a case of joint trespassers, in regard to the plea of a prior judgment in bar, and the change of property, must apply with equal, if not greater, propriety, in successive actions of trover, brought against different individuals, for the conversion of the same property.

In the case under consideration the judgment against Chevalier did not vest the property in him, and, consequently, he had no right, on this ground, to sell it to the defendants. And if the defendants, on demand, refused to deliver the property to the plaintiffs, they were guilty of a conversion, and are liable in this action.

From these considerations the Court think the record of the Virginia judgment is not evidence to bar the plaintiffs' action; to influence the jury in their assessment of the damages in this case; to show in whom the legal right to the property is vested; or, for any other conceivable legal purpose.

Before the jury the counsel contended that the right of property was clearly shown, by the evidence, to be in the plaintiffs. That McCourtney and Read acted as their agents, and received from them ten thousand dollars. That the indorsement of the draft, by Chevalier, for the three thousand dollars, gave him no lien on the wheat purchased. That it was an ordinary case of indorsement, which gave the indorser no specific lien on the property of the drawer, when it might happen to come into his hands.

But that, if a lien could arise out of this transaction, the delivery of the wheat, by Chevalier, on board of the plaintiffs' boat, and to Ford, their agent, who had charge of the boat, it

was relinquished, and can not afterwards be asserted. That this delivery placed the wheat as much out of the power and control of Chevalier, as if it had been delivered into the warehouse of the plaintiffs. That the lien of a factor or agent is inseparable from the actual or implied possession of the property. That a tortious possession does not divert the lien, but that every voluntary relinquishment of the possession of the property is an abandonment of the lien.

That the greater part of the wheat purchased was not delivered, and that to such part, if a lien existed, the plaintiffs could set up no claim, as against Chevalier, without indemnifying him. That it was not shown that Chevalier had paid more than one half of the three thousand dollar bill, though he had the bill in his possession; and having retained more than half of the wheat purchased, and the sum of eighteen hundred dollars received from the defendants, he was bound, in justice, to account to the defendants for any loss or damages they should sustain by the purchase of the wheat.

That if the plaintiffs should recover in this action, they would still be losers, by the failure of McCourtney and Read, about eight thousand dollars, and that Chevalier could have no ground of complaint, if he, by giving credit as an indorser to the same firm of McCourtney and Read, should, also, sustain a loss which, at most, would be very small in comparison with the plaintiffs'.

These positions were all controverted by the counsel for the defendants, and they insisted there was no such delivery of the wheat, in question, as divested the lien of Chevalier. The Court instructed the jury, substantially, as follows:

After recapitulating the evidence, as above stated, you must be satisfied, gentlemen, that the legal right of property in this wheat was in the plaintiffs, before you can find in their favor. And this the plaintiffs insist has been shown by the contract

with McCourtney and Read, the advance to them of ten thousand dollars, and the fact of the purchase of the wheat, by Chevalier, under their direction. So far as it regards this right, it can be of no importance, whether Chevalier had any knowledge of it or not. He, no doubt, until after the failure of McCourtney and Read, considered himself as their agent in purchasing the wheat. And he looked to them, only, for the necessary funds. But this could not, in any respect, affect the agency for the plaintiffs, under which McCourtney and Read acted.

It is by no means necessary, in establishing their right, for the plaintiffs to show that the same money advanced to McCourtney and Read was handed over to Chevalier. Having made the advance, McCourtney and Read were bound, in good faith, to purchase the wheat and pay for it; and so far as such purchase was made by themselves or their agent, as against them, the legal right to the wheat, was, unquestionably, in the plaintiffs.

If the indorsement, by Chevalier, of the three thousand dollar draft, was one of ordinary occurrence, as contended by the plaintiffs' counsel, it is clear that it gave him no specific lien on the property of the drawer. But is this the character of that transaction?

Chevalier had engaged to purchase wheat for McCourtney and Read, and had, in fact, purchased four thousand bushels, at one dollar per bushel, having received from them an advance of one thousand dollars; he calls upon them for funds to complete his payments, and the sum of three thousand dollars is raised, partly on his credit. And about the time he was to deliver the wheat, he is informed that McCourtney and Read had failed, and that the bill which he had indorsed would not be paid.

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Under these circumstances had not Chevalier a right to withhold the delivery of the wheat until he was indemnified? The Court think he had, whether such delivery was demanded by McCourtney and Read or the plaintiffs.

In making the purchase Chevalier acted as the agent of McCourtney and Read; and the rule of law which applies to a factor will apply equally to him.

A factor has a lien on the property of the principal, in his hands, for all advances made, and for any balance that may be due. The lien, also, exists for responsibilities incurred by the factor for the principal, in the general course of their business. And this is, especially, the case where the principal is insolvent, and the liability of the factor is about to be enforced. 3 Har. and John. 339. 6 Greenleaf, 51 to 57. 10 Wend. 318. 2 Kent, 638, 639.

No case could well be imagined which could more strongly illustrate the propriety and justice of the rule, which gives a lien for responsibilities incurred, than the one under consideration.

But this lien is put an end to by a voluntary delivery of the property. And this case must turn on the fact of the delivery of the wheat, by Chevalier, in the boat, to Ford, the agent of McCourtney and Read, or of the plaintiffs, it matters not which.

The boat was purchased by McCourtney and Read for the plaintiffs, in pursuance of their contract, and the management of the boat was committed to Ford.

It seems from fifteen hundred to two thousand bushels of wheat were delivered on board of this boat by Chevalier. This was done before he was informed of the insolvency of McCourtney and Read; that the wheat belonged to the plaintiffs; and that the bill he had indorsed would not be paid.

Now, if there was an unconditional delivery of this wheat to the agent of the plaintiffs, or of McCourtney and Read, the

lien was abandoned. The factor or agent can not stop property in transitu, where he has voluntarily delivered up the possession of it, on any pretence that he has a lien upon it for advances made on account of the principal. Having parted with the possession of the property he has relinquished his lien and can not reassert it.

The owner may, in some cases, regain the possession of property, sold and delivered by him, and hold it until the payment of the consideration shall be received. But this can not be done by a factor whose interest is special, and connected with the possession.

If you shall find that the delivery of the wheat was conditional, and, in fact, made to Ford as the agent of Chevalier, and to be subject to his control, then there was not such a delivery as divested Chevalier's lien, and the plaintiffs must fail in their action.

If the wheat had been lost between the place where it was put on board of the boat and Gallipolis, whose loss would it have been? This may illustrate the character of the delivery. For if there was such a delivery as to make the loss that of the plaintiffs, then there is no ground on which the lien of Chevalier can be enforced. With the possession he parted with the lien. But, on the contrary, if the loss, had one occurred, could have been charged to Chevalier, then he did not part with the possession, or the lien connected with it.

The jury will determine from the evidence as to the effect of the delivery of this wheat, under the above rule.

It is immaterial, if you shall find for the plaintiffs, whether the defendants had notice or not of the foregoing circumstances, prior to their purchase of the wheat. For if the lien of Chevalier was extinguished by a delivery of the property, he could convey no right to it which can defeat the plaintiffs' title. A demand of the property, by the plaintiffs, under such

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circumstances, and a refusal by the defendants, is all that is necessary to sustain the action.

Should you find for the plaintiffs, you have a right, in the exercise of your discretion, to include interest on the value of the property sold to the defendants from the time of its conversion, as a part of the damages.

The jury could not agree on their verdict, and they were discharged by the Court, and the cause was continued.

At the subsequent term the case was submitted to the jury on, substantially, the same charge when the jury found for the plaintiffs.

UNITED STATES vs. E. S. HAYNES et al.

An appeal from the District, to the Circuit Court, must be prayed for and allowed, to the next Circuit Court held within the district.

Appeals from the District, to the Circuit Court, are limited to cases of admiralty and maritime jurisdiction.

All other cases from the District, to the Circuit Court, are removed by writ of error.

This cause was argued by Mr. *Swayne* for the defendant, and by the *District Attorney* for the plaintiff.

OPINION OF THE COURT.

THIS is an appeal from the judgment of the District Court. A motion, to dismiss the appeal, is made by the defendants' counsel, on two grounds.

First: Because it does not appear that any appeal was prayed or allowed by the District Court;

Second: Because an appeal does not lie in such a case.

By the 21st section of the Judiciary act of 1789, in case of an appeal from the District, to the Circuit Court, it must be entered and allowed to the next Circuit Court held within the district. 1 Gall. 416. 3 Mason, 443.

This is an action brought on an official bond; and, in such a case, no appeal lies from the District, to the Circuit Court.

In the case of *The United States v. Nourse*, 6 Peters, 495, the Supreme Court say, the jurisdiction of the District Court is limited to cases at law, and of admiralty and maritime jurisdiction. From all decrees over a certain amount, in the latter, appeals may be taken to the Circuit Court; but judgments of law must be removed by writ of error.

The act of 1803, which provides that, "from all final judgments or decrees in any of the District Courts, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed in the Circuit Court," the Supreme Court, in the above case, say, made no alterations in the law of 1789, as it respects appeals to the Circuit Court, except in reducing the sum or matter in controversy from three hundred, to fifty dollars, on which such appeals shall be allowed. 11 Peters, 166.

The appeal must be dismissed on both grounds taken in the motion.

M. T. Maury v. D. Talmadge.

M. T. MAURY vs. TALMADGE.

A contract, made by stage passengers with the agent of the line as to the number of passengers, can not be proved by a passenger, who, at another part of the route, took his seat, in a suit by him against the proprietor.

Being no party to the contract, and, in fact, having no notice of it, it afforded no inducement to him to become a passenger.

A general custom, as to the number of passengers conveyed, may be proved, but not the practice established on the route.

The declarations of a driver, whose conduct is not implicated, that the stage was topheavy, and overloaded, not evidence.

The words of the agent, to be evidence, to charge the principal, must be a part of the res gesta.

Stage proprietors are bound to use the greatest care for the safety of passengers. The least neglect by the driver, or want of skill, makes them liable.

The proprietors are responsible if the coach is driven out of the usual track, and an injury is, consequently, done.

It is the duty of a driver to caution the passengers when he is about to pass over a place of road, bridge, &c., attended with danger.

This cause was argued by Messrs. *Ewing* and *Stanbery* for the plaintiff, and Messrs. *Wright* and *Hunter* for the defendant.

OPINION OF THE COURT.

THIS action was brought to recover damages for the upsetting of the defendant's stage, in 1839, in which the plaintiff, being a passenger, was much injured. The upset was near Somerset, on the route from Chillicothe to Zanesville; and is charged to have been caused by the want of skill, and negligence in the driver, overloading the stage, and want of lights. Plea, not guilty.

The plaintiff offered evidence to prove that, at Maysville, in Kentucky, the southern terminus of the route, a special contract was made with the agent of the defendant, by the passengers, that not more than six passengers should be admitted inside the stage, and one on the outside.

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The plaintiff took his seat at Portsmouth, in a line of the defendant's, which connected with the Maysville and Zanesville line, at Chillicothe.

The above evidence was overruled by the Court, on the ground, that the plaintiff was not a party to the contract, and could claim no benefit under it. There is no proof that he had any knowledge of the contract; and, of course, it could have formed no inducement with him to travel in the line. He took his seat with no other pledge or guaranty from the proprietor, than that which the law implies.

On the part of the defendant, the driver was examined as a witness, there being no objection to his competency by the plaintiff.

The defendant offered evidence to prove that it was the custom on that route to carry as great a number of passengers as were in, and on, the stage. This was objected to by the plaintiff, and the Court sustained the objection. The defendant can not give, in evidence, a custom or practice established by himself, in his own justification, or in extenuation of the damages. The practice may be such as the law does not warrant, and, in that case, it should operate against the defendant. A general custom, as to the number of passengers conveyed by a coach of the same size, on other routes, may be proved; but this, in each case, must be regulated by the kind of road over which the stage is to pass. A number of passengers may be conveyed, by what is called a nine-passenger coach, on a level and paved road, with safety, which would be extremely hazardous on a road unpaved, and hilly. In a case of this kind, therefore, there can be no unvarying custom, as to the number of passengers. The number must be regulated by the character of the road; and the ordinary danger of stage travel must not, in any degree, be increased by overloading the stage. The question may be asked of drivers, acquainted with the road,

what number of passengers could be safely conveyed by a nine-passenger coach, in the state the road was at the time of the upset.

By way of rebutting evidence, the plaintiff offered to prove the declarations of the driver, who preceded the one implicated, that the stage was topheavy, and overloaded. To this evidence the defendant objected, and the Court sustained the objection.

In favor of the admission of the evidence, it was insisted, that it was proper to be received, in proof of a fact connected with the cause. That, in the case of *Saltonstall v. Stokes*, 13 Peters, 181, the Circuit Court not only permitted the declarations of the driver to be given in evidence, but, also, the declarations of passengers, made in the hearing of the agent, and to him; that, in the case of *McKinney v. Neil*, at the present term, the declarations of the passengers to the driver, and, also, among themselves, when the coach was about to upset, were proved; that every driver, being an agent of the defendant, and being a competent judge whether the stage was overloaded or not, his declarations on the subject, while driving, are evidence.

But the Court remarked, that the declarations of an agent are made evidence against his principal only, when they are part of the *res gesta*. While making the contract, or performing any act in his capacity as agent, he acts in the place of the principal, and what he says respecting the thing then being done, is evidence. But, afterwards, his account of the transaction, though given immediately, is not evidence.

Now, if the driver, whose declarations are offered in proof, were the agent of the defendant to load the stage, still, his declarations could not be evidence, as he spoke of a past transaction. He said the stage was topheavy, and overloaded. This referred to the loading of the stage, and not to any act then being done.

But the driver was not the agent for this purpose. The agent was the keeper of the stage office at Lancaster, who admitted two additional passengers. What he said, at the time of making up the load, would be evidence against the defendant.

In the case of *Saltonstall v. Stokes*, the declarations of the driver, at the time of the upset, were proved as a part of the *res gesta*. And the remonstrances of the passengers to the agent, against the driver, were proper, as notice to him that the driver was not in a state to be trusted. This should have led the agent to a strict examination of the condition of the driver, and was evidence, the same as if the remonstrances had been made to the proprietor of the line.

Remonstrances of the passengers, to the driver, are also evidence, as going to warn him of danger, which should increase his vigilance. And so, as evidence of a fact, tending to show that the stage was not suddenly upset, the remark of a passenger, that the stage was going over, was proved.

If the driver, implicated in this case, at the time of the upset, had assigned, as the cause of it, the overloading of the stage, the declaration would have been so connected with the disaster, and explanatory of it, as to be admissible in evidence; it would have been a part of the *res gesta*.

The main question in the case, is, whether the stage was overloaded. And, to prove this fact, the declarations of a driver, who is a competent witness, and whose conduct is, in no respect, implicated in the case, are offered in evidence; for this can be the only ground of admitting them. The counsel say, they wish these declarations to be received merely as a fact—not to prove the truth of the fact. But how can they be admitted on this ground?

Neither the proprietor of the line, nor the driver, who is charged with negligence and want of skill, was present. The

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declaration, then, can not operate as notice to any one, so as to have the least bearing in the case. And, if the declarations be admissible, it must be with the view of establishing the fact, that the stage was overloaded. The Court, therefore, overrule the evidence.

The evidence being closed, and, also, the arguments of counsel, JUDGE LEAVITT charged the jury substantially as follows:

The law relative to the liability of stage proprietors has been so fully expounded in another case submitted to, and passed upon, by this jury at the present term, that it will be unnecessary, on this occasion, to enter at large upon the consideration of that subject. As the present case, however, differs from the one referred to, in the facts connected with it, and the ground on which a recovery is sought for, it may not be amiss to call your attention, very briefly, to some general principles that may serve to guide you in your deliberations.

It is a principle which commends itself to the reason and common sense of every man, that he who engages in the business of conveying passengers, by stage-coaches, or otherwise, for a reward, takes upon himself certain legal responsibilities, which the law will recognize and enforce. In the absence of an express contract to that effect, the law implies an undertaking to convey his passengers with safety, so far as human foresight and care can accomplish that object. And, it is well settled that, if an injury happen, which is fairly chargeable to the least negligence or want of skill, or prudence, on the part of the proprietor or his agents, he is answerable for it. Judge Story, in his treatise on Bailments, lays down the law as follows: "If he (the driver) is guilty of any rashness, negligence or misconduct, or is unskillful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins

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so loose, that he can not govern his horses, the proprietors of the coach will be answerable. So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if by incaution, he comes in collision with another carriage." On the other hand, it is equally well settled, that coach owners do not guaranty the safety of their passengers, at all events, and against all hazards. They are not liable for injuries which result from accident or misfortune, where there has been no negligence or default.

Keeping these general principles in view, it will be the duty of the jury to make the application of them to the case now under consideration.

The grounds on which it is insisted the defendant is responsible for the injury, which the plaintiff has suffered, are the overloading of the coach, and the negligence and carelessness of the driver. As it relates to the allegation in the declaration, that the accident happened from the want of lights upon the coach, it is presumed the jury will find no difficulty in arriving at the conclusion, from the evidence, that the moon was shining when the upset happened; and that there was no necessity for lights; and that no negligence is imputable to the defendant, on this ground. In this view of the case, the inquiries of the jury will, in the first place, be directed to the two points indicated, namely, the overloading of the stage, and the carelessness and negligence of the driver.

Without attempting to present, in detail, the evidence of the several witnesses who have testified in the case, it will be sufficient for the Court to give a concise view of the material facts, as they are understood to be established.

In October last the plaintiff, a Lieutenant in the Navy of the United States, at Chillicothe, in the State of Ohio, took a seat

in one of the defendant's coaches, for Wheeling. On its arrival at Lancaster, the coach contained nine passengers. At that place the defendant's agent, contrary to the remonstrances of some of the passengers, consented to take three others; two of whom took their seats with the driver, and the third one, then in a state of intoxication, was placed on the top of the coach. They arrived at the town of Somerset about 12 o'clock at night, which place they left, after changing horses, with the same passengers, namely—nine inside, and three outside, making, with the driver, thirteen persons, and without an unusual quantity of baggage. Owing to an obstruction, occasioned by the construction of a turnpike, on the route of the old road, a new road, for some distance from Somerset, had been completed a few days before, along which the stage had passed several times. For the distance of about one hundred yards, the new road was made along the side of a slope, by digging down the higher portion of the route of the road, and placing the excavated earth on the lower side, so as to produce a level surface. The width of this part of the road was eight or nine feet, and the track, passed over by carriages, was settled, and tolerably firm; but the part next to the descent of the slope, being made of removed earth, recently placed there, was unsettled and soft. In passing over this part of the new road, at a very slow rate, and when it was slightly ascending, the right wheels of the coach left the beaten track, and, for a distance of twenty five feet, departed gradually from the track, until they were from two to four feet away from it; the right wheels, in the mean time, sinking deeper and deeper in the soft earth, till the coach upset. Two witnesses stated that the driver, at the time the wheels left the track, was attending to a conversation going on between some of the passengers. One witness testified, that he thought the driver made an effort to turn the horses on to the track, when he discovered the coach had left it. It ap-

peared that it was perfectly in the power of the driver to have stopped the coach, and to have given the passengers an opportunity to get out, after leaving the track, and before the upset. It was also proved, that the driver said, shortly after leaving Somerset, that the coach was too heavily laden; and, as a witness at the stand, he stated that he considered the load dangerous for that part of the road. The plaintiff, in conversation with Dr. Stone, after the accident, said he did not blame the driver; but that the agent was censurable, for overloading the coach. It was conceded, that the general character and habits of the driver, were good, and that he was a man of experience and skill in his calling.

At the time of the upset, the plaintiff was sitting with the driver, and at his right hand side. The plaintiff was thrown several feet from the stage. The physicians who saw, and attended him at Somerset, testified, that one of his knees was dislocated, upward and downward; the ligaments of the kneepan torn asunder, leaving the kneepan an inch out of its natural position; and, also, that there was a longitudinal fracture of the thigh bone. Two eminent surgeons of Philadelphia, who examined the plaintiff's knee some months after the accident, testified that, in addition to the injuries above stated, there was a vertical fracture of the *patella*, or kneepan. They also state that the joint is greatly deformed, and the injury so great and permanent in its character, as to disable the plaintiff, for life, from the performance of his duties as a Lieutenant in the Navy. He was, previously to the accident, possessed of a robust constitution, and enjoyed excellent health. He was detained at Somerset 70 days, in the hands of surgeons, confined generally to his room, and suffering a good deal of pain. At the expiration of that period, he was able to move about, with the aid of crutches, and set off, by private conveyance, for his residence in Eastern Virginia. The expenses of plaintiff, during his de-

tention at Somerset, for medical attendance, boarding, nurses, &c., amounted to about \$250.

On this state of facts in relation to the upset, it is insisted by the plaintiff's counsel, that the disaster is attributable to the excessive weight upon, and especially the top-heaviness, of the coach; or, if not fairly chargeable to this cause, it is to be imputed to the carelessness and negligence of the driver, or to a combination of both these causes; and that, in either case, the defendant is responsible for the consequences.

Whether the coach was, in fact, overloaded, must be decided by the jury from the evidence, and with reference to the particular circumstances connected with the case. It is impossible to lay down any general rule, by which the inquiry, whether a coach is excessively laden, can be satisfactorily tested. The character and condition of the road over which a vehicle is to pass, will be the main consideration in such an inquiry. It will be obvious to the jury that, upon a properly graded and well-finished turnpike, there will be no great danger of the upsetting of a carriage, from any weight that may be put on it; while upon one of the common roads of the country, especially over a hilly region, there might be very great danger in conveying a weight, which, under other circumstances, could not be regarded as excessive. It will, therefore, be the duty of the jury, in coming to a conclusion on this point, to take into consideration the number of passengers, the weight of baggage, the general character of the road along which the defendant's stages run, and, especially, the portion of it over which the coach was passing, when this accident occurred. And, if the jury believe it can be fairly referred to the improper loading of the coach, there can be no question but what the defendant is legally answerable for the consequences. It is clearly the duty of a stage proprietor to see that the safety of his passengers is not put at hazard by an excessive load; and, if he disregards or violates

his duty in this respect, he is liable for any injury that may follow. Nor can it be regarded as a legal excuse for such misconduct, that loads of the same, or even greater weight, have been previously transported, with safety, upon the same road.

As to the other position taken by the counsel for the plaintiff, namely, that there is proof of carelessness and inattention on the part of the driver, in this particular case, and that this may be regarded as the cause of the overturn, it is only necessary to remark that, if the jury believe this point to be established by the proof, then, on the principles already laid down by the Court, they will be justified in returning a verdict for the plaintiff. On this point, it is insisted that the driver, without any necessity or excuse for so doing, permitted the coach, while proceeding at a slow rate, and upon ground slightly ascending, to depart from the track, till the right wheels sunk so deep into the earth as to cause the upset. The jury will observe, that the law holds a driver to the observance of the strictest care, and the most unremitting vigilance. And, however unexceptionable may be his general character as a driver, if, in a particular instance, he is guilty of carelessness or negligence, whereby an injury occurs to a passenger, his employer, whose agent he is, is accountable.

If, therefore, the jury should come to the conclusion, after a deliberate examination of the testimony, that the coach, owing to the excessive weight put upon it, was unmanageable, in the circumstances in which it was placed, by any power or skill which could be applied or used by the driver, and was, therefore, upset; or, if they should believe that the driver, even from a temporary inattention or neglect, permitted the coach to get into a predicament, from which an upset was the inevitable result; or, if they believe that the disaster, in the present case, is referable to these two causes combined, they will find for the plaintiff.

If, on the other hand, from an attentive consideration of the facts of the case, as exhibited by the evidence, the jury should be of the opinion that the accident, in question, is not imputable to any impropriety of conduct on the part of the defendant's agent, in loading the stage, or to any negligence or carelessness on the part of the driver, but was, as contended for by the defendant's counsel, the result of mere accident or misfortune, which no human foresight, care or attention could have prevented, the defendant can not be held legally answerable.

On the subject of damages, it is only necessary to remark that, if the jury should come to the conclusion that the plaintiff has made out his case, in accordance with the principles indicated by the Court, it will be competent for them to return a verdict for any amount they may think just, within the limit of the sum laid in the declaration. In the assessment of damages, the jury is not restricted to the actual expenditures of the plaintiff, in consequence of the injury received, and compensation for the loss of time; but may properly take into consideration the nature and extent of the injury, and its probable bearing and effect upon his prospects in life, in reference to the profession which he has adopted. The subject of damages, however, belongs so exclusively to the jury, that it would not be proper for the Court to enlarge upon it. The case is committed to the jury, with the fullest confidence that they will give it the most mature consideration, and return such a verdict as will acquit themselves, satisfactorily to their own consciences, of the solemn responsibility resting upon them.

(The jury returned a verdict for the plaintiff, and assessed his damages at \$2,325.)

Benjamin Woodworth v. Spaffords and Earl.

BENJAMIN WOODWORTH vs. SPAFFORDS AND EARL.

A judgment obtained against Earl, in a suit against him, and the other two defendants, merges the instrument on which the action was founded

And such judgment may be pleaded in bar to an action on the instrument against one or all of the defendants.

This Court is presumed to know the laws of the respective States, and, consequently, that the Circuit Court of Wayne county, in Michigan, is a court of general jurisdiction.

It is not necessary, therefore, in the plea setting up their judgment of the Circuit Court of Wayne, to aver that it had jurisdiction.

Where the note is joint the suit must be brought against all, and a joint responsibility must be shown, unless one or more of the promisors has been discharged by infancy, or by operation of law.

This cause was argued by Mr. *Swayne* for the plaintiff, and by Mr. *Wilcox* for the defendants.

OPINION OF THE COURT, BY JUDGE LEAVITT.

The declaration in this case is in assumpsit, and contains four special counts. The first sets out a note for \$500, dated December 6. 1836, drawn by Saltmarsh and Boardman, and Hugh Gillis & Co., partners, &c., payable to Benjamin Woodworth, or order, in ninety days from date. The notes described in the second, third and fourth counts, are for \$1,000, each, drawn by the same parties, bearing the same date, and payable, respectively, in six, nine and twelve months. The fifth count is general, for goods sold, &c.

The defendants have put in a plea of the general issue, and, also, a special plea in bar. The matter set up in the latter plea, is as follows: "That, on the 24th of March, 1838, the said Benjamin Woodworth sued out of the clerk's office of the Circuit Court of Wayne county, in the State of Michigan, his certain writ of *capias*, in a plea of trespass, on the case upon promises, against the said Amos Spafford, Jarvis Spafford, and Williard Earl; and, afterwards, to wit: on the 9th day of July,

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in the year aforesaid, filed his declaration; and afterwards such proceedings were had in said suit, that at the December term of said court, viz: on the 28th of December, 1838, judgment was rendered therein, in favor of the said Benjamin Woodworth, against the said Amos Spafford, for the sum of \$4,006 33, and costs." The plea concludes with an averment, that the said judgment is unreversed, and remains in full force; and that the notes described in the declaration, in the present action, are the same on which the said judgment, in Michigan, was obtained. To this plea the plaintiff has put in a general demurrer.

It is contended, on several grounds, that the special plea is insufficient as a bar to this action. The objection, mainly relied on, and which will first claim the attention of the Court, is: That the judgment set forth in the plea does not extinguish the original cause of action, and that a suit may be sustained on it against all the parties.

In the consideration of this point, as the case is presented upon the demurrer, it is to be assumed, that the notes set forth in the declaration, on which it is sought to charge the defendants, have originated in a partnership transaction, with which they are connected, and which create, on their part, a partnership liability. And, therefore, in considering the question, whether the judgment set out in the plea has extinguished the right of action against these parties, it is important to settle, in the first place, the nature and character of their liability, as partners. If that is to be regarded as *joint* and *several*, it would clearly result, that a suit prosecuted, and a judgment recovered against one, without an actual satisfaction, would be no bar to a subsequent suit against the other parties. On the other hand, if their undertaking, and consequent liability, are to be viewed as *joint*, then, upon the authority of the cases

which will be referred to by the Court, a suit and judgment against one, is a bar to a subsequent suit against the other joint promisors.

It would seem to be consistent with the current of authorities, both in this country and in England, to consider partnership contracts as *joint*, and not *joint and several*. It is true, that the assertion of Lord Mansfield, in *Rice v. Shute*, 5 Bur. Rep. 2,611, has often been relied on, as sustaining a contrary doctrine. It is there said: "That all contracts with partners are *joint and several*; every partner is liable to pay the whole. But it has been remarked by an eminent American Judge, in reference to this position: 'That it would be straining Lord Mansfield's opinion unreasonably, to say, that he meant, technically, that all contracts with partners were joint and several.'" 13 Johns. Rep. 451. It seems very obvious, by reference to the facts in the case of *Rice v. Shute*, and the circumstances under which the question, before the Court, was presented, that the principle asserted by Lord Mansfield must be understood with some modification. In that case it appears that the plaintiff, with a knowledge that Shute and Cole were partners, brought suit against Shute *alone*; and without having pleaded the nonjoinder in abatement, the defendant, Shute, on the trial, proved that fact, and the plaintiff was, thereupon, nonsuited. And it was upon a motion to set aside the nonsuit that the opinion of the Court was given. The object had in view by the Court, seems not to have been the settlement of the law, as to the nature of partnership liabilities, but the establishment of a rule by which the defendant should be compelled to plead in abatement the nonjoinder of a party who ought to have been joined; and that he should not be permitted to take the plaintiff by surprise, on the trial, by proof of the nonjoinder. To this extent the doctrine laid down by the Court is undoubtedly correct, and promotive of the purposes of justice.

Taking it to be a principle which is universally sanctioned by courts, at the present day, that partnership contracts are *joint*, and not joint and several, the inquiry is, whether the judgment against the defendant, Spafford, is a bar to the present action.

The affirmative of this proposition is very fully sustained by many decisions of high authority in this country; some of which will be adverted to.

In the case of *Ward v. Johnson and Johnson*, 13 Mass. Rep. 148, has some close points of resemblance to the one now under consideration. The declaration in that case averred that Henry Johnson, in the name and behalf of the partnership of Henry and Thomas Johnson, executed the note in controversy. The defendants pleaded, in bar, the recovery of a former judgment against Henry Johnson, in a suit prosecuted against him alone. To this plea there was a replication of *nul tiel record*; and the existence of the judgment, set out in the plea, being proved, the Court held it to be a good bar to the action against both of the partners. In the opinion of the Court, in this case, these principles are maintained: That, in a joint action, to support the declaration, a joint subsisting cause of action must be shewn against both defendants; and, that, if one of the defendants can plead a sufficient bar, as it respects himself, it shall avail the other defendants also; for it shews that, at the time of the commencement of the action, no just cause of action remained, thereby falsifying a material averment in the declaration.

The same principle is recognized by the Supreme Court of Pennsylvania, in the case of *Smith and another v. Black*, in error, 9 Serg. and Rawle, 142. The facts were that Black, the defendant in error, had sold goods to Nathan Smith, (one of the plaintiffs in error,) who gave his promissory note therefor; on which suit was brought, and a judgment obtained,

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against him. Subsequently, on the discovery that Newberry Smith was a secret partner of Nathan Smith, a suit was instituted against both; and the former judgment against Nathan Smith was held to be a good bar to that action.

In the case of *Downey v. The F. & M. Bank of Greencastle*, 13 Serg. and Rawle, 288, it was held, that where a joint suit was brought against two obligors in a joint and several bond, on one of whom the writ was served, and as to the other returned non est, and the plaintiff proceeded to judgment against the obligor, on whom process had been served, without making the other a party, he thereby elected to consider the contract as *joint*, and could not afterwards sue the other obligor, in a separate action. The judgment against his co-obligor was viewed as an extinguishment of the bond, as to him, and being extinguished as to him, was extinguished as to both.

A very decisive authority on this subject is found in the 13 Johns. Rep. 459. The case is that of *Robertson v. Smith*. The material facts may be thus briefly stated: Robertson held two promissory notes, drawn by Soulden, Smith & Co., on which suits were brought, and judgments recovered, against Soulden and Smith, the ostensible partners. Failing to obtain satisfaction on his judgments, and believing there were two other persons connected with Soulden, Smith & Co., as partners, the plaintiff instituted another suit against Soulden, and Smith, and the two other partners. One of the points, arising in the case, was, whether the plaintiff, having made the two partners, against whom judgment had been recovered, parties in the pending suit, it can be sustained against the other defendants, in consequence of the extinguishment of the simple contract debt, as to two of the defendants, by the judgment against them. The opinion of the Court, as given by Chief Justice Spencer, evinces great learning and research, and may well be regarded as conclusive on the point just stated. The

results, to which he is conducted, are—that in case of joint debtors, they must be jointly sued; that if a less number than the whole be sued, that is matter that can be pleaded in abatement only; that it is necessary to show a *joint* subsisting indebtedment, in all the defendants; and in cases of assumpsit, it is necessary to show a subsisting liability, on the part of all the promisors, except one or more of them may have been discharged by operation of law, as in the case of a release under an insolvent or bankrupt law, or where a release has been effected under a plea of infancy. And, moreover, where, as it respects any of the defendants, the right of action is gone or suspended, their joint liability being at an end, the other defendants may avail themselves of this suspension or discharge.

In the present case, the judgment against the defendant, Spafford, in the State of Michigan, must be viewed as a merger of his liability, on the simple contract set forth in the declaration; and, upon the authorities referred to, the plaintiff having, by his own act, put it out of his power to prove that there is a subsisting joint contract, on which all the defendants are liable, he can not recover against any of them.

The only case referred to by the plaintiff's counsel, as opposed to the principles settled by the cases already noticed, is that of *Sheehy v. Mandeville and Jameson*, 6 Cranch, 253. That case came before the Supreme Court of the United States, on error, to the District Court, sitting at Alexandria, in the District of Columbia. It was an action of assumpsit against the defendants, on a promissory note, drawn by Jameson alone. It was alledged that the note, though thus executed, was, in fact, a partnership note, on which the defendants were both liable. In that case there was a special plea, similar to, if not identical with, the plea in the present case, both as to form and substance. It averred that Jameson had been previously sued, and that judgment had been recovered against

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him, in the Circuit Court of the District of Columbia, on the same note, and that the judgment was in full force and unreversed. The defendant, Jameson, having been discharged under the insolvent law of the District, soon after the institution of the suit, the plea was interposed by Mandeville alone, and no further notice was taken of the other defendant during the progress of the suit. Chief Justice Marshall, who delivered the opinion of the Court, held, that the prior recovery of the judgment against Jameson was no bar to the action against Jameson and Mandeville, jointly.

From an examination of the opinion of the Chief Justice, in that case, it will be seen that he lays great stress upon the fact that the original action, in which judgment was recovered, was brought against but one of the parties, and upon a sole contract. He admits that, "had the action, in which judgment was obtained against Jameson, been brought against the firm, the whole note would, most probably, have been merged in the judgment." This language is understood, as equivalent to the assertion, that if the original action had been brought against both the partners, on a joint contract, and a judgment recovered against one only, the right of action against the other might have been extinguished. This is clearly inferable from what follows: "The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, and that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant; not to a case in which the declaration in the first suit was on a sole contract." The principle laid down by the Chief Justice is not, therefore, applicable to the present case. The persons originally sued in Michigan are the defendants here. That was an action on a joint, and not on a sole, promise; and, therefore, according to

the position of the Chief Justice, the present is a case in which the doctrine of merger may be applied, since both the original and present suits are against the same parties, and for the same cause of action. It would be doing injustice to the reputation of that great Jurist, to assume that he intended to lay it down as a sound principle of law, that separate judgments can be recovered on a contract, joint in its terms and character, except where such a course may be authorized by express legislative enactment. Such a doctrine would destroy the well settled distinction between joint and joint and several contracts; and would, in effect, vest in courts a power to change by construction, the contracts of parties, and give them an operation, not within their contemplation or design.

There is another exception taken to the plea in this case, namely—That it does not contain an averment that the Court in Michigan, in which the judgment is alledged to have been entered, had jurisdiction of the case.

On this point it will be only necessary to observe that, by the settled practice, both of the state and federal tribunals, they take notice of the general and public laws of a State, without requiring them to be specially presented by plea. And as the Circuit Court of Michigan is created, and its jurisdiction and practice regulated by law, it must be regarded as a court of general jurisdiction, proceeding according to the course of the common law, and, therefore, it is not necessary that the plea should contain an averment of its jurisdiction. The Court will take judicial notice of the fact, that the case, set out in the plea, is within its legal jurisdiction.

The only remaining exception to the plea is, that it does not alledge satisfaction of the judgment which is set up in bar of this action.

As to this exception, the only remark called for, is—that in the view in which the judgment in Michigan is held to be a

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bar to the plaintiff's right to recover in this case, it is wholly immaterial, whether the judgment is satisfied or not, and the averment of satisfaction is not, therefore, necessary.

The demurrer to the special plea is overruled.

Mr. *Swayne* appeared for the plaintiff.

Mr. *Wilcox* appeared for the defendants.

JESSE C. SMITH vs. JOHN PEARCE AND H. PEARCE.

Where the specifications of a patent are defective, under the late act of Congress, a new patent may be obtained with corrected specifications, which relates back to the date of the original patent.

A patent for an improvement in a machine, which had been previously patented to another person, can not protect the right of the patentee, unless the improvement be substantially different in principle from the original invention.

An alteration merely formal, or a slight improvement, will give no right.

The jury will determine, from the models exhibited, and the other evidence, whether there is a difference in principle between the two machines. That is called principle in a machine which applies, modifies, or combines mechanical powers to produce a certain result.

This cause was argued by Mr. *Fox* for the plaintiff, and by Mr. *Green* for the defendants.

OPINION OF THE COURT.

This action is brought for the infringement of a patent right, by the defendants, claimed by the plaintiff.

The plaintiff's patent is dated 25th September, 1837, and, under the late act of Congress, relates back to the 9th of January, 1830, the date of his first patent, for the same invention, which was invalid by reason of a defective specification.

In the specification, or schedule, the plaintiff claimed to have invented a "new improved mode of grinding, holding, and accommodating millstones," for grinding grain, &c.

"The nature of the invention consists in the peculiar construction of the husk or frame, to be used for the purpose of accommodating and securing millstones for grinding grain into meal or flour, or any other business calculated to be done under the operation of grinding. The husk or frame is made of iron, compact and firmly secured together by bolts. The mills are calculated to be transported with safety, all finished in a perfect and workmanlike manner ready for grinding. They are to be put in motion either by straps or cog-gearing; whichever the purchaser shall choose." A drawing with a particular description accompanied the application for a patent.

The defendants pleaded not guilty, and gave in evidence a patent to Henry Pearce, one of the defendants, for an improvement upon the plaintiff's patent. In the specification the improvement is stated to "consist in the manner in which the patentee constructs the part which he denominates the pressure rod, which is intended to elevate the bridgetree, and, consequently, the running stone, and to regulate the action of the mill in that particular part." This specification was, also, accompanied by a drawing.

Several machinists, and other witnesses, testified that the invention of the plaintiff was of great utility. That each run of stones would make thirteen barrels of flour in twenty four hours, and that the flour is of a better quality than that which is manufactured in the ordinary way, and sells higher. That a steam engine of fourteen horse power, which will consume a small amount of fuel, will be sufficient to turn five pairs of stone.

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The plaintiff, also, proved that for some years the defendants had been engaged in making mills on the same principle as the plaintiff's patent, for sale; and that he had sent great numbers of them to Mississippi and Louisiana; also, some evidence as to the profit on the mills thus constructed and sold.

The principal question in the case is, whether Pearce's improvement on the plaintiff's patent is such as protects him in the right which he has exercised.

That part of the plaintiff's patent which he claims to be new, and of his own invention, is "connecting the bridgetree with the top part of the frame, or whatever may be used as a substitute, in the manner herein described, or any other manner embracing the same principles and producing the same effect. And the mode or manner of depressing, as well as elevating, the running stone by application of the screw to the bridgetree, in the manner here described, or any other producing the same effect."

A slight alteration in the structure of a machine, or in the improvement of it, will not entitle an individual to a patent. There must be a substantial difference in the principle, and the application of it, to constitute such an improvement as the law will protect.

The principle here spoken of is not a new mechanical power. For centuries no new power in mechanics has been discovered. But the powers known have been so modified and combined as to produce results the most extraordinary. Results which have distinguished the present age. The principle consists in the mode of applying or combining mechanical powers which produce a certain result. The law which secures to the inventor the exclusive benefit of disposing of his invention, for a term of years, is founded upon considerations of sound policy. And the right, thus secured, is not to

be destroyed by open infraction, or a mere colorable improvement.

The jury are to judge by an inspection of the models and from the evidence, whether the two machines differ in principle.

Nothing is more common than for persons, skilled in the structure of machines, to disagree in regard to the principles of them. As it respects their form there can be but little difference of opinion among those who examine the machines. In this case machinists, who have been sworn as witnesses, do not agree, but the greater number seem to think that there is no substantial difference, in principle, between the two structures.

In their form the machines are alike. Indeed, it would seem to require a nice observer to point out the difference.

The principle of elevating and lowering the upper stone seems to be that which is new, and which gives value to the machine. And it will be for the jury to say, whether the rod with screws at both ends of it, by which the bridgetree, and, consequently, the upper stone is elevated or lowered, is not in principle the same, whether it rests by a shoulder on the middle or lower part of the frame, or whether, in fact, there be one rod or two.

The main question is, whether the principle, by which the upper stone is elevated and lowered, is substantially the same in both machines. If this be the case, your verdict must be for the plaintiff, with such damages as you shall think him entitled to. There are some cases of violation of patent rights more aggravated than others. And the Court would remark to the jury, that, in the present case, there do not seem to be any circumstances which should much, if any, increase the damages beyond what may be supposed the reasonable profit of the defendants in manufacturing and selling the machine in question. The defendants may have supposed they were pro-

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tected under their patent. But if the jury shall think, on a full view of the case, that there is not a mere formal difference, but a substantial one, in the principles of the machines, they will find for the defendants, 4 Wash. C. C. 706. Phil. on Patents, 372. 2 Brock. 310. 3 Wash. C. C. Rep. 449. 3 Car. and Payne, 502. 1 Peters, C. C. Rep. 342, 398, 399. 1 Gall. 429.

The jury found for the plaintiff, and assessed his damages at \$2,150, on which judgment was entered.

JOSEPH SCOTT AND M. T. SCOTT vs. WILLIAM HAWSMAN.

A lease, under seal, may be put an end to by a new and substantial agreement, between the parties, for the same premises; which has been sanctioned by a Court of Chancery, and performed by the party, who alleges the abrogation of the lease.

A parol lease, under which no act has been done by the lessee, who has constantly repudiated it, but who has enjoyed the premises the term named in the lease, may be treated by the lessor as a subsisting lease, and he may seek his remedy under it; or he may bring his action and recover the rent on a count for use and occupation.

The defendant having disclaimed the lease, and refused to perform its conditions, cannot defeat the action for use and occupation; by showing that under the lease, the amount of the second year's rent was to be fixed by a third person, which had not been done.

The tenant, under such circumstances, may be considered as holding over.

Having refused to abide by the lease he cannot complain of being treated as a tenant bound, after the enjoyment of the premises, to pay a reasonable rent.

This cause was argued by Mr. *Leonard* for the plaintiffs, and by Mr. *Swan* for the defendant.

OPINION OF THE COURT.

This action was brought for use and occupation, and it was agreed by the counsel that no objection should be made to the declaration for want of a special count.

From the facts proved, it appeared that in March, 1832, Joseph Scott and Matthew T. Scott, the plaintiffs, owning a stock farm in Ohio, Joseph Scott and William Hawsman, the defendant, entered into a contract, under seal, with Matthew T. Scott to rent the farm for five years, and to pay him one hundred and eighty dollars per annum.

Certain improvements were to be made on the farm, on conditions specified in the lease. The parties, also, entered into an agreement in regard to the stock which should be purchased for the farm, &c.

Afterwards, the 28th January, 1835, a final settlement took place respecting the partnership transaction, in which certain sums of money were to be paid, and were in fact paid by Joseph Scott to Hawsman, and certain things were to be done by the latter. By this settlement and agreement, Hawsman was to remain in possession of the farm for the years 1835 and 1836; the rent for the first year was to be paid for by improvements on the farm, and the amount of the second year's rent was to be fixed by Judge Hawsman. A memorandum of this agreement was made, but it has been lost.

Among other arrangements the defendant signed the following paper: "On settlement of accounts this day, I am to deliver to Joseph Scott the wagon and the yoke of cattle on hand, and five hundred and eighty five dollars worth of stock cattle on demand. January 28th, 1835." Signed, William Hawsman.

A short time after this settlement, Hawsman filed a bill against Joseph Scott and M. T. Scott to set aside the settlement, &c., which was answered by Joseph Scott; and on the final hearing the Court refused to set aside the agreement but affirmed it, and in their decree they "dismissed the bill as to all matters as to which the decree is not rendered, and especially to the rents and profits of the place and farm mentioned in the

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bill subsequent to the settlement of the partnership, and not included therein made at the time in the bill specified."

It was proved that the defendant refused to deliver the cattle as he had agreed to do and repudiated the settlement, and the new lease which was connected with it. This was done more than once, though he remained in possession of the farm for two years, for the rent of which this action was brought.

The Court instructed the jury that the action was not founded on the original lease between the defendant, Joseph Scott and Matthew T. Scott, and that under the agreement of the parties and the decree of the Court, it could not be considered as a subsisting lease, and that if the jury believed the evidence the plaintiffs were entitled to recover. And the jury found a verdict for the plaintiff.

A motion for a new trial was made on two grounds.

First: Because the Court erred in deciding that the original lease was rescinded; and,

Second: Because they erred in their instruction to the jury that the plaintiff was entitled to recover, for the second years rent, before Judge Hawsman had fixed the amount.

During the existence of the lease, under seal, sums of money were advanced by Matthew T. Scott, to Hawsman, to buy stock for the farm. Their partnership extended beyond the terms of the written lease, to the stock thus purchased; and it appears when the settlement took place, in January, 1835, it included not only the partnership in the stock then on the farm, but the written lease. It was clearly intended to be a final settlement of all matters, and, of course, it embraced, up to that time, all matters of contract, and of account.

This appears from the terms of the settlement. Certain outstanding obligations were to be delivered up, and certain sums paid by the respective parties; and Hawsman gave the note for five hundred and eighty five dollars, payable in stock

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cattle, as above stated; and in the same writing he agreed to deliver to Joseph Scott a wagon and yoke of cattle, then on hand, &c. And it was agreed that Hawsman should continue on the farm for two years; the first year's rent to be paid for by improvements and repairs on the farm, and for the second year he agreed to pay an amount of rent that Judge Hawsman, the brother of the defendant, should determine.

Now this arrangement closed all former dealings between the parties, and is wholly inconsistent with the subsistence of the prior written lease.

A judgment having been obtained by Joseph Scott on the above instrument, given to him by the defendant, the defendant filed a bill against Joseph and M. T. Scott to set aside the settlement on the ground of fraud, &c., and obtained an injunction.

Joseph Scott answered the bill, and on the final hearing, among other matters it was decreed, that an order for four hundred and fifty dollars, drawn by William Hawsman on Joseph Scott, 11th April, 1834; also a note for two thousand dollars, signed by William Hawsman, Joseph Scott, Isaac Hawsman, Jacob Hawsman and David Reeves, dated 26th April, 1832, payable to Matthew T. Scott, shall be delivered up to the Clerk to be canceled; that the injunction should be dissolved at the costs of the complainant; and the bill was dismissed "as to all matters as to which the decree is not rendered, and especially to the rents and profits of the place and farm mentioned in the bill subsequent to the settlement of the partnership, and not included therein." This decree was made the 25th December, 1837.

The language of this decree is very explicit, and shows that, from the time of the settlement, rents were to accrue from the defendant, and that all matters, up to the time of the settlement, were closed by it. Now the rents, under the written

lease, were to be paid by Joseph Scott and the defendant to Matthew T. Scott. The terms of the settlement, with the exception of the delivery of the order and note, named in the decree, were complied with by the Scotts; and by their decree the Court sanction the settlement. It was a material part of that settlement that the written lease should be annulled, and a new lease between Joseph and Matthew T. Scott and the defendant was agreed to.

Under these circumstances the Court consider the old lease as abrogated and not as subsisting, and that it cannot be used to defeat the action of the plaintiffs.

The counsel for the defendant contends that Matthew T. Scott was a party to the written lease, and does not appear to have been a party to the settlement or the second lease; and that it does not appear that Joseph Scott was authorized to act for his brother in these matters. That on this ground the settlement ought not to be binding on Matthew T. Scott. That, however, this may be in regard to the stock on the farm, it cannot be held to have rescinded the lease, under seal, which can only be rescinded by an instrument of equal dignity, if it be not in fact canceled.

The evidence does not show that this lease was delivered up to be canceled. It is not produced on this trial, and whether the writing has been destroyed or not does not appear. It is only adverted to by defendant's counsel to show that the plaintiffs' remedy is on the deed and not on the parol agreement.

For this purpose, as before remarked, we think this lease cannot be used.

The plaintiffs do not rely on a parol cancelment. But they rely upon a final settlement, which annulled the lease, a performance of the conditions on their part, and the express sanction of the settlement by a Court of Chancery.

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This is not then an alteration of a writing, under seal by parol, nor an attempt to set up a parol release of the same.

But if the written lease were subsisting, we should be equally clear that this action could be maintained.

Where a contract, under seal, has afterwards been varied in the terms of it by a distinct simple contract, made upon a sufficient consideration, such substituted or new agreement must be the subject of an action of assumpsit, and not of an action of covenant; and where several things, unconnected with a deed, are, with other stipulations in a deed, afterwards made the subject of a parol contract, assumpsit may be sustained for the breach of it. 1 Chitt. Pl. 119. 1 East. 630. 3 Term, 596. 4 Taun. 748. 2 Caines, 296. 9 Wheat. 556.

A parol enlargement of the time set, in a sealed instrument, for the performance of covenants, is good; but where there is such enlargement of a condition precedent, the plaintiff loses his remedy upon the covenant itself, and must seek it upon the agreement enlarging the time of performance. 2 Wend. 587. 6 Hal. 327.

If, in respect of a new consideration, there has been a new simple contract to pay a debt, or perform a contract, under seal, assumpsit may be supported. 12 East. 578. 7 Cowen, 39. 2 Rawle, 350.

From these authorities it is clear that the plaintiffs may recover under the new lease, even if the one under seal were subsisting; but we think, under the settlement and the proceedings which followed it, that the old lease is annulled, and that the parol lease was substituted in its place.

The objection of want of power in Joseph Scott to bind his brother, we think is entitled to but little consideration. Joseph and Matthew are brothers, and own the farm in partnership. Joseph was the active partner, and there is evidence, positive and presumptive, which shows an acquiescence and sanction

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by Matthew T. Scott in the acts of his brother, in regard to the settlement and the proceedings which followed. Both of the plaintiffs are citizens of Kentucky, and one of the reasons assigned for putting an end to the first lease, was a wish, on the part of Joseph Scott, to remove to Kentucky.

We think the verdict ought not to be set aside and a new trial granted, on the ground that Judge Hawsman did not fix the amount of rent for the second year, under the parol lease.

The verdict is fully sustained by the equity of the case, and, under such circumstances, a Court will not readily set aside the verdict on a technical objection.

The principle is admitted, that where the defendant's contract was executory, or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the nonperformance. 7 Co. 10, *a*. Com. Dig. Pleader, 6, 51, 52. Dougl. 686. 1 Term, 638. 3 John. 146. 13 John. 94, 53, 57. 10 John. 359.

But in the case under consideration the defendant, shortly after the new contract or lease was made, repudiated it and utterly refused to be governed by it. Having been in possession under the prior lease, he did not enter under the new one, and he seems to have done no single act under it. He still retained possession of the farm for two years, disclaiming the new lease, and claiming to hold under the lease which had been put an end to. In addition to the positive proof on the trial of the declarations and acts of the defendant, to this effect, proof of his intention is shown by the bill he filed to open up the settlement. Failing in this, he now endeavors to defeat the present action, not only by relying on the lease, under seal, but

on the ground that the proof does not show the second year's rent has been fixed by the person named in the contract for this purpose; and this, it is insisted, is a condition precedent to the payment of the rent.

The force of this objection could not be resisted if the defendant had, by his declarations and acts, entitled himself to the benefits of the new lease.

He disclaimed it, refused to make the improvements or do any act under it, and avowed a holding under the abrogated lease.

Shall the defendant, under these circumstances, having occupied the farm two years, avoid the payment of a reasonable rent under a count for use and occupation.

He cannot be considered in the light of a trespasser, as his entry was not tortious; but rather in the light of holding over after the expiration of his term.

But, in this case, the prior lease cannot regulate the rent, as that gave him possession only of a part of the farm, and that, under circumstances, which looked chiefly to the rearing of stock as profit; when, for the two years specified, he has enjoyed the entire farm.

The new lease was by parol, and the parties had a right to rescind it by parol; and, we think, that from the facts proved the plaintiffs had the right to consider the lease as rescinded, and they have so treated it by bringing this action. The contract being proved, they undoubtedly had a right to treat it as a subsisting lease and seek their remedy under it; but the declarations and the acts of the defendant gave them the right to annul it, and consider him as a tenant at sufferance, or as holding over.

They took no steps to dispossess him until the expiration of the two years, and we think, under the circumstances, that the general action, for use and occupation, will lie against him;

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and that the plaintiffs were not bound to treat the parol lease as subsisting, and refer to Judge Hawman the amount to be paid for the second year's rent.

The motion for a new trial is overruled, and judgment, &c.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1840.

HUGH R. KENDALL vs. JOSEPH L. FREEMAN AND S. SIBLEY.

In an action by an assignee, against an assignor of a negotiable note, it is not necessary to prove the execution of the note.

The indorsement must be proved.

If the indorsement be by two persons, and the declaration avers that it was indorsed by the defendants, by the name of A. B., it is sufficient.

Where the contract shows a joint liability, it is unnecessary to alledge or prove a partnership.

Mr. ——— appeared for the plaintiff, and Mr. Tryon for the defendants.

OPINION OF THE COURT.

THIS action is brought on a promissory note; and the questions for decision are raised, by the demurrer of the defendants' counsel, to the first, second and third counts of the plaintiff's declaration.

In the first count the declaration sets forth, that "the Sutton Woolen Mills," by Joseph L. Freeman, their agent, made their certain promissory note, &c.; and, it is objected, there is no averment that the "Sutton Woolen Mills" are an incorporated company, (an ordinary firm doing business in that name,) or for what purpose that name has been assumed.

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This action is not brought against the "Sutton Woolen Mills," but against the defendants, as indorsers of a note thus given. Now, is it necessary, in this action, for the plaintiff, who is assignee, to prove more than the assignment?

In the case of *Jones v. Morgan*, 2 Camp. 477, Lord Ellenborough held that, in an action by the indorsee against the drawer of a bill of exchange, where the declaration contained an averment of acceptance, the plaintiff was bound to prove it. But this decision was overruled, in the case of *Tanner v. Bean*, 4 Barn. & Cres. Rep. 312; and, also, in 6 Dowl. & Ry. 338. In the former case, Chief Justice Abbott remarked: "The acceptance, or nonacceptance, does not vary the responsibility of the indorser, appearing on the declaration; it is, at all events, his duty to pay the bill when due, if the prior parties do not." And, in that case, although the declaration contained an averment that the bill had been accepted, yet the Court held the acceptance need not be proved.

To sustain the present action, it is not necessary to prove the execution of the note, but the indorsement of it by the defendants; and this is admitted by the demurrer. *Lambert v. Oaks*, 1 Ld. Raym. 443. 1 Salk. 127. 2 Phil. Ev. 22. *Harris v. Bradley*, 7 Yerger, 310.

It is further objected, that, in the first, second and third counts, it is alledged "that the said defendants, by the name and description of Freeman and Sibley, to whom, or to whose order, the payment of the said sum of money was directed to be made, &c., indorsed the said note, and thereby became liable to pay," &c., without averring that the said Freeman and Sibley were partners, or by what means or authority the said note was so indorsed.

The averment is, that "the defendants, by the name of Freeman and Sibley, indorsed the note," &c.; and what more can be necessary? That the note was so indorsed, is admitted by

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the demurrer. And does not the indorsement, thus made, make the defendants liable as indorsers? The indorsement shows a joint liability of the defendants; and, where they are so bound by the contract, it is never necessary to alledge a partnership.

If the defendants, instead of admitting, had denied the assignment, it would have been necessary for the plaintiff to prove it. This might have been done by showing a partnership, and that the note was indorsed by one of the partners, in the name of the firm; or, that the defendants were present, and affixed, or assented to the signatures, as stated on the assignment. In the former case, an allegation of partnership would have been necessary.

Where a note is given or assigned by A. and B., they may be sued as such, without any averment of partnership. They assume a joint responsibility, and, whether they are general partners or not, they are jointly bound by the contract.

The demurrer is overruled. Judgment, &c.

SPAFFORD et al. vs. WOODRUFF.

A plea *plea darrein continuance*, properly verified and filed, within the rules of the Court, will not be set aside on motion.

The facts alledged in the plea, show that it has been filed in good faith; and the allegations must be denied by a replication, or admitted by a demurrer.

The filing of this plea waives all prior issues.

Mr. *Goodwin* appeared for the plaintiffs, and Mr. *Frazer* for the defendant.

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OPINION OF THE COURT.

THIS is an action of assumpsit, brought against the defendant as the indorser of a note. The general issue was pleaded; and, since the last continuance, a plea puis darrein continuance, which alledged that this action is brought against the defendant as indorser of a note, on which the plaintiffs, who are the holders, since the last continuance of this cause, obtained a judgment against the maker and the first indorser, and that they gave time to the defendant, which operates as a release to the defendant in this action. This plea is sworn to, as the rule of the Court requires. And, a motion is now made to set aside this plea, by plaintiffs' attorney, on the ground that it is irregular, and a nullity.

Great certainty is required in pleas of this description. The plea may be in abatement, or in bar of the action, and the matter of defence must be specifically stated, and the time it arose. In these respects, the present plea is not defective, and it is verified by affidavit. Under such circumstances, it is said the Court can not set the plea aside on motion, but are bound to receive it. Bro. Abr. Continuance Pl. 5, 41. Jenk. 160. *Prince et al. v. Nicholson, Ex'r of Nicholson*, 5 Taun. 333. *Lovell v. Eastaff*, 3 Term Rep. 554.

The interposition of this plea waives all prior issues; nor can the plaintiff, afterwards, proceed thereon. 1 Chitt. Pl. (ed. 1837) 697. 1 Salk. 168. 2 Strange, 1105. 5 Taun. Rep. 333.

The matter set up in this plea, so far from appearing to be fraudulent or evasive, presents a serious question; and the facts should either be traversed by a replication, or admitted by a demurrer. The motion is, therefore, overruled.

CLUTE AND MEAD vs. GOODELL.

A sheriff is responsible for the acts of his deputy.

Messrs. *Frazer* and *Walker* appeared for the plaintiffs, and Messrs. *Witherell* and *Buell* for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant, who acts as sheriff, for the misconduct of one of his deputies.

It was proved that an execution was issued, on a judgment, for \$3,898 09, and costs, the 25th Nov. 1837; which was, on the same day, placed in the hands of the deputy, to levy and collect the amount immediately. A levy was made on a store of goods, amounting to thirteen or fourteen thousand dollars, which belonged to the defendant, named in the execution. But an arrangement was made with him by the deputy, under which the goods were sold, and only a small part of the proceeds of the sale, was applied in satisfaction of the execution.

The Court instructed the jury, that the sheriff was responsible to the plaintiffs for the acts of his deputy, and that, if the levy was made on a sufficient amount of goods to satisfy the execution, which the deputy failed to dispose of, as by law he was bound to do; they would find against the defendant, the amount due on the judgment, including interest.

The jury rendered a verdict, for the plaintiffs, for \$3,418 48.
Judgment.

Thomas v. Clark and Cole.

THOMAS vs. CLARK AND COLE.

By the rules of the Court, a plea which denies the instrument on which the action is founded, or the indorsement of it, must be sworn to.

If filed without affidavit, the general issue may be good for some purposes, but the note and the indorsement, under such plea, are admitted.

And this admission is, that the signature on the note is as averred in the declaration.

Messrs. *Lockwood* and *Barstow* appeared for the plaintiff, and Mr. *Backus* for the defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants, who are partners, as indorsers of a bill of exchange to the plaintiff.

A rule of Court requires a plea of the general issue, denying the execution of an instrument, or of an indorsement on which the action is brought, to be sworn to. The general issue in this case being filed, without oath, a question is made, whether the ground of the action is admitted.

The defendants' counsel contends, that the signatures of Clark and Cole, as they appear to be indorsed on the note, only are admitted, and not the partnership, and that it is necessary for the defendants to prove the partnership.

The rule was designed to prevent delays by filing issues, which are not true in fact. A plea of the general issue, under the rule, may be good for some purposes, but it admits the instrument on which the action is brought. In this case, the indorsement by the defendants is admitted. *Smith v. McManus*, 7 Yerger, 477. But to what extent does this admission go? Most clearly, the admission is, that the defendants indorsed the note, as they are alledged to have done in the declaration. In the declaration, they are stated to be partners, and, as such, indorsed the note in the partnership name.

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This construction of the rule imposes no hardship on the defendants. If the note were not indorsed by them, as partners, they might have sworn to the plea, which would have thrown on the plaintiff the necessity of proving their signatures, as alledged in the declaration. Judgment.

FALCONER AND HIGGINS vs. HENRY M. CAMPBELL AND OTHERS.

The 2d section of the 12th article of the constitution of Michigan provides, that "the Legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each House."

This does not restrict the Legislature from creating more than one incorporation in the same act.

No act of the kind can pass, except by the requisite majority; but in the same act as many bodies corporate may be created, as the Legislature, in the exercise of their discretion, shall deem proper.

In such an act as distinctive a character, and as effectual guards against abuse, may be provided in each corporate existence, as if each were established by a separate law.

And if, in the exercise of their discretion, the Legislature may establish any given number of corporations in the same act, they may establish an indefinite number.

The number, whether limited or indefinite, is a question of policy, but, under the Michigan constitution, is not one of principle.

The act of the Legislature of Michigan, entitled "an act to organize and regulate banking associations," passed 15th March, 1837, under which the "Detroit City Bank" was incorporated, is constitutional.

The directors and stockholders of that bank are a corporation, and not merely a partnership or joint stock association.

By the amendatory act of 30th December, 1837, all banks under the former law, were recognized as corporations—and the "Detroit City Bank" was then organized and doing business.

To create several corporations in one act is an ordinary mode of legislation.

Where a statute imposes liability, as in this case, where the directors are made responsible for the debts of the bank, the action of debt is proper.

The existence of the bank is sufficiently stated in the declaration, though by way of recital.

Facts are stated in the declaration which show that the defendants became a body corporate and politic, and this is sufficient without a special averment to that effect.

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The fact of incorporation is an inference of law. Not necessary to aver that the law was passed by the constitutional majority.

That question, if raised, must be raised by plea. Where the law bears upon its face the requisite authentication, the vote by which it was passed cannot be inquired into.

Having acted as directors the defendants might be estopped to deny their own authority; but they may object if the declaration do not show every ground necessary to a recovery.

In this respect the declaration is sufficient.

The Legislature cannot create an obligation or impose a penalty, for an act, which, when done, incurred no such liability.

If the declaration is founded on an amendatory act, which refers to and continues the provisions of a former act, it should conclude "against the form of the statute," and not statutes.

This cause was argued by Messrs. *Seaman* and *Fraser* for plaintiffs, and by Messrs. *Romeyn* and *Joy* for defendants.

OPINION OF THE COURT.

THIS action is brought against the Directors of the Detroit City Bank to recover from them the amount of a bill of exchange, drawn by the bank, in favor of the plaintiffs, on the Albany City Bank of New York; which was protested for nonpayment.

The declaration states that, whereas, heretofore, in the year 1837, books were opened to receive subscriptions of stock for a bank to be called the Detroit City Bank, under the act entitled "an act to organize and regulate banking associations;" which subscriptions were received. That, afterwards, the defendants were elected directors of said Detroit City Bank or banking association, and then and there entered into the duties of their offices respectively, as directors of said bank. That Frederick H. Harris was elected Cashier of the bank, and that the defendants, claiming to have complied with all the provisions and requirements of said act of the Legislature, and claiming to constitute a body corporate under the name of the Detroit City Bank, at Detroit, commenced doing business as a bank or banking association, under the name aforesaid, and by virtue of said act of the Legislature; and continued to do busi-

ness as a bank until the 10th of February, 1839, when the bank failed. And the plaintiffs aver that the bank then and there became insolvent, and is still insolvent, and that the defendants continued to act as directors of the bank the whole time aforesaid; and that as directors, they became subject to the provisions of an act to amend "an act entitled 'an act to organize and regulate banking associations, and for other purposes,' " which took effect the 10th January, 1838.

And the plaintiffs aver that the 6th December, 1838, the bank, by its Cashier, made its bill of exchange, directed to the Cashier of the Albany City Bank, of the State of New York, for seven hundred and seventeen dollars and thirty nine cents, to be paid in six months after the date thereof to John Falconer & Co., who indorsed the same to the plaintiffs. That the bill not being paid at maturity was protested, of which due notice was given; and that by force of the statute the defendants became liable to pay, &c.

In the second count the plaintiffs alledge that "the said Detroit City Bank was organized and transacted business as a banking institution," &c., and the same allegation is contained in the third count, which is a general one.

The defendants filed a general demurrer, and in the argument it is insisted that the declaration, in several particulars, is insufficient. Before these are considered we will examine the principal questions raised by the demurrer. These are

First: Are the associations authorized by the general law corporations?

Second: Had the Legislature power to pass such a law?

The act in question is entitled "an act to organize and regulate banking associations." The first, second, third, fourth, fifth, sixth and seventh sections, provide in what mode the associations shall be formed. Application is to be made, in writing, to the treasurer and clerk of the county, where the busi-

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ness is to be transacted, stating the amount of capital proposed. Of this application public notice is required to be given. Bond, in the sum of thirty thousand dollars, to be approved of by the treasurer and clerk, must be entered into. The capital stock is limited, and the subscriptions are to be received and apportioned, &c. Ten per cent. on shares subscribed are required to be paid.

And when the capital stock of the proposed association shall be subscribed and ten per cent. paid, on notice being given to the stockholders, they are authorized to meet and elect nine directors, a majority of whom are authorized to manage the affairs of the association. They are required to elect one of their number president; and in the 9th section it is provided, that "all such persons as shall become stockholders of any such association, shall, on compliance with the provisions of the act, constitute a body corporate and politic in fact and in name, and by such name as they shall designate and assume to themselves, &c.; and by such name they and their successors shall and may have continued succession, and shall, in their corporate capacity, be capable of suing and being sued, pleading and being impleaded, &c., in all courts whatsoever; and that they and their successors may have a common seal, and by such name as they shall designate, adopt and assume as aforesaid, shall be in law capable of purchasing, holding and conveying any estate, real or personal," &c. By the 15th section the directors, for the time being, or a majority of them, have power to make bylaws.

The ordinary powers of a corporation are—1. Perpetual succession; 2. To sue and be sued, and to receive and grant by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal; and, 5. To make by-laws.

Some of these powers are incidents to a corporation, but they are all, generally, expressly given by statute in this country; and these powers are all given in the act under consideration. It expressly provides that the association, authorized by the act, when formed, shall "constitute a body corporate and politic in fact and in name."

The act not only gives in terms all the requisites to constitute a corporation, but the body, when formed, is technically designated by it as such. Where, then, is the ground for argument or doubt on the subject? Did not the Legislature comprehend the force of the language they used? They have created an artificial being, giving to it, in well defined terms, its just proportions and powers, and have called it by its appropriate and technical name. Could the Legislature, in language more clear and forcible, have created a corporation? Not a quasi corporation; not a joint stock company, or a limited partnership, but, substantially and technically, a corporation.

In illustration of this act of the Legislature, it is unnecessary to refer to the mode of creating corporations in England by grant from the Crown, or point out the distinction which may exist between a body thus created and one created by a statutory grant; or between an ancient and modern being of this sort. It is enough to know that it is not essential to the character of a corporation, that its powers should be equal to any similar association, either ancient or modern. It is sufficient, if, in its corporate name, it exercises the powers and rights of a natural person in the management of its concerns.

We can entertain no doubt that the associations authorized under the above act were intended to be, and are, in fact, corporations.

Had the Legislature power to pass this law? This is the great question in the case, and it is fully and fairly presented by the demurrer.

The 2d section of the 12th article of the constitution of Michigan declares, that "the Legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each House." And it is earnestly, ingeniously and ably contended, that this is an inhibition of the creation of corporations by a general law. That corporate powers, under it, can only be conferred by express enactment in each case.

That the majority of two thirds of each House is required to pass the law, whether general or special, cannot be doubted; and although this question must be raised by a special plea and is not now before us, it may not be improper to suggest that this act having the constitutional sanctions required upon its face it is not perceived how, in regard to the majority by which it was passed, it can be distinguished from any other law. To pass an ordinary act a majority of each House is necessary, but to pass an act of incorporation a majority of two thirds is required. Now if, in the latter case, the majority by which the bill was passed may be denied by a plea, why may it not be done in the former. And if the Court may go behind the law and canvass the votes by which it was passed, why may they not investigate the qualifications of the members of the Legislature.

We are told that the people of Michigan were jealous of monopolies, and, especially, of bank monopolies, and that by the introduction of the above section into their constitution they intended to restrict the powers of the Legislature in making such grants. That such was their intention is clear from the language of the section. A law which confers corporate powers can only be passed by a vote of two thirds of the members of each House. But must each corporation be created by a separate act? This is the ground taken in support of the demurrer. No act of incorporation shall be passed by the Legislature unless with the assent of at least two thirds of each

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House, are the words of the section. The word *act* is used in the singular, but does it necessarily import that not more than one corporation can be created in the same act?

Suppose ten distinct applications were made to the Legislature for bank incorporations at the same session, and the Legislature were disposed to grant each application, must they pass ten acts of incorporation, or may not the ten corporations be granted in the same act? Would not such a law be within the letter and spirit of the constitution? Of this there would seem to be little doubt.

As distinctive a character may be given to each corporation in such an act, as if each were established by a special law. In 1834 an act was passed by the Legislative Council of the Territory of Michigan, entitled "an act to establish branches of the Bank of Michigan, Farmers' and Mechanics' Bank of Michigan, and Bank of the River Raisin." Such acts are common, and it is believed never to have been supposed that the legislative power might not be exercised in this mode. The restriction in the constitution does not prohibit it.

And if this may be done under the constitution, then the construction, that each corporation must be created by a special law, can not be sustained.

This is a question of power, and not of policy. The Court may look at the circumstances under which the constitution was adopted, and these may explain, at least to some extent, the objects which its provisions were intended to secure. But whether these objects be wise or politic we can not inquire. The constitution bears the impress of the sovereign will, and it must stand as the paramount law. It regulates and limits the exercise of legislative powers. And if an act of the legislature be clearly repugnant to the constitution, it is of no validity. But to produce this result the repugnancy must be

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obvious. It must not arise by implication, but by giving to the constitution and the act the full import of their provisions. And if, on this comparison, the provisions of the one are irreconcilable with those of the other, the act must be made to yield. But if the repugnancy be doubtful, and the act may be so construed as to harmonize with the constitution, it must stand. This is due to the legislative construction of the constitution, and is a well established rule of judicial decision.

At the time the constitution of Michigan was adopted, in many of the states, and in this territory, it was the ordinary course of legislation to create corporations by a general law. This was the case in Ohio, and in many of the other states. And it can be of no importance whether banking or other associations were thus incorporated. The power was exercised. Does the constitution prohibit the exercise of this power?

It has already been shown that an act which shall establish several banking corporations is not repugnant to the constitution. And this reduces the objections to the law under consideration to two points:

First: That a corporation, being a grant, must be made to a person or persons in esse.

Second: The indefinite number of banking corporations which, under the law, may be established.

The first objection, on examination, will be found to have but little force.

The creation of a corporate existence can never take effect until the association be formed, and the organization completed. Commissioners are generally designated in the act, who are to superintend the opening of the books and receive subscriptions of stock. And when the amount shall be subscribed, and the necessary payments made, the stockholders elect directors who appoint a president and cashier. The organization being

completed, existence is given to the artificial being, and its agency commences. It is now in esse, but before this it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive the law could have had no effect.

In this case, then, the grant of the franchise is not made to a person or persons in esse. The commissioners did not constitute the corporation, nor was the franchise, in any form or degree, vested in them.

This is the general mode in which corporations are created, and it has stood the test of time, and of legal scrutiny. No valid objection is perceived to it.

In regard to this objection the act under consideration rests upon the same ground as other and more special acts on the same subject. The franchise is not vested in either until the organization be completed, and this depends upon the voluntary association of individuals.

In a special act commissioners are named to open the books and receive subscriptions of stock; in the act under consideration the clerk and treasurer of each county are required to perform this duty. They are commissioners for this purpose. And, so far as the grant is concerned, if it be valid under one law it must be so under the other.

We come now to consider the objection that an indefinite number of banking corporations are authorized by the general law, and this, it is supposed, is not only repugnant to the policy, but the express provision of the constitution.

It can not be said that this law violates any express provision of the constitution. The extent of the provision referred to is, that no act of incorporation shall be passed except by at least a majority of two thirds of each branch of the legislature.

Now, this does not limit the number of corporations which shall be established, nor the number which may be

created in one act. The act must be passed by a majority of two thirds, and this is the only express restriction on the subject. If the range of legislative power be restricted beyond this, it must be done by construction.

There may be a wide distinction between the policy of a general and a special banking law, but this is not a question for judicial cognizance. Is there such a difference in principle, as to make the one constitutional and the other unconstitutional? This is the inquiry now to be made.

As it regards the power of the legislature, it is, unquestionable, whether they establish one or fifty banking institutions. The same power which may establish one bank, under the constitution, may establish fifty.

In the general law, as above observed, commissioners are appointed, the county clerk and treasurer, to receive subscriptions of stock the same as in a special act. And the mode of organization, under both acts, is substantially the same.

The only difference seems to be that in the special act the number of corporations is limited, whilst under the general act they are indefinite.

And here it is contended that the legislature have, in substance, conferred the power to form corporations by voluntary associations, without exercising that special scrutiny, in each case, as is required by the constitution.

But is this a sound and practical view of the case?

It may be admitted that it derives great force from the disastrous results which have been realized under this law; but these have nothing to do with the question of power under consideration. Suppose the results had been as beneficial as they have been injurious, how changed would have been the argument. But the question remains unaffected by the good or evil which resulted from the law.

The legislature, in the exercise of their discretion, seem to have concluded, that, by requiring securities on real estate, and subjecting the directors to certain liabilities, it would be good policy to multiply the banking institutions of the State. And in order to avoid the charge of monopoly, which had been so liberally applied to banking incorporations by a general law, they held out to the community at large equal privileges in forming such associations. The act which thus sanctions an indefinite number of banks, depending upon voluntary associations, is passed by the requisite majority of two thirds of both Houses of the Legislature.

Now, what is the practical operation of this law? It, in effect, declares that the clerk and treasurer of each county in the State shall be authorized to open books and receive subscriptions of stock, and when the associations, thus formed, shall become organized, they shall be in fact and in name bodies corporate and politic. The law acts as directly upon associations thus formed, as if it had been passed expressly to incorporate each association. It is special to each. And the difference between a general and a special law of this character, in this respect, seems to be that the one is passed on the special application of a few individuals, whilst the other is enacted under the influence of a general policy. But the question of power is the same.

May not the Legislature determine the number of banks that shall be established? This will not be controverted. And if they may do this, may they not, under the constitution, pass an act, by a majority of two thirds in each House, to establish voluntary associations without limiting their number.

Suppose the general law had limited the number of banks, to be established under it, to ten, could their power to pass the law have been doubted. They throw around the institutions, thus to be organized, all the guards and checks which they

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deem necessary for the public interest. The law acts as directly and distinctly upon each association as if it had been the only one established under it. And, in passing the law, the Legislature exercise the same scrutiny as if they were about to incorporate only one bank. Such a law would be within the letter and the spirit of the constitution. And if the Legislature may do this, may they not fix on a greater number of banks than ten; or, may they not, in the exercise of their discretion, authorize the establishment of an indefinite number? Whether the number shall be large or small is a question of policy and not of constitutional power. If a large or indefinite number of corporations may be created in the same act, under as salutary restrictions as the creation of one, is the policy of the constitution disregarded?

It is contended that the general law throws off the restraints imposed by the constitution. But is this so? There is not a restriction in the exercise of corporate powers, which can be imposed by a special law, that may not be imposed under a general law. And the power of the Legislature acts as directly in the one case as in the other. In the general law, then, there is no disregard of the restraints of the constitution. Having the power to establish more than one corporation in the same act, the Legislature may establish many, or an indefinite number. The number, whether indefinite or limited, does not render the law repugnant to the constitution. If it has been passed by the constitutional majority, it is within the restriction.

By the thirty sixth section of this law the Legislature reserve "the power to alter or amend the act, and to dissolve any association to be incorporated under its provisions, by a vote of two thirds of each House."

Here is a power not usually reserved in granting franchises. And it would seem that, so far as the policy of the law may

be considered, this reservation of power gives to the Legislature as salutary a control over these grants, for the public good, as would have been exercised in acting on special applications for charters. And the presumption is, that if the general law had not passed, the number of banks, under special laws, would have been as great, and the consequences not less disastrous.

The evil is not to be found in the constitution, or in the construction of the constitution, but in the elements of which the government is composed. The true remedy is found in the sober reflection, experience and intelligence of the community.

In the argument reliance was placed in the decision of the case of *Thomas v. Dakin*, in the Court of Errors of New York. That case involved the constitutionality of "an act to authorize the business of banking." The constitution of New York declares "the assent of two thirds of the members elected to each branch of the Legislature shall be requisite to every bill, creating, continuing, altering, or renewing, any body politic or corporate;" and the question was, whether the associations formed under the act were corporations; and, if they were, whether the State had power to create them by a general law; and, also, whether the law must not have been passed by a majority of two thirds?

The opinion of the High Court of Errors has not been published, but it is understood that they decided the associations were limited partnerships and not corporations.

In the same case, however, the Supreme Court decided that the associations, under the law, were corporations, and that the Legislature, by the requisite majority, could pass the law. The argument in that case was, as in the case under consideration, that the Legislature could only create corporations by a special law in each case.

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On a comparison of the respective constitutional provisions, it will be found, that the language of the restriction in the constitution of New York is more specific and individual than the provision in the constitution of Michigan. The former uses the words, in reference to the majority required, "every bill," "creating, continuing, altering, or renewing, any body politic or corporate," whilst the terms used in the latter are general. The decision, therefore, of the Supreme Court of New York, by a majority of the judges, that a general law, creating corporations, is constitutional in that State, is a strong authority in the present case.

There is another view of which this case is susceptible, and which would seem to be conclusive.

The first general law was passed the 15th March, 1837, and, under the reserved power to alter or amend that act, the Legislature, the 30th December, 1837, passed an amendatory law, which took effect the 10th of January, 1838. This amendment, with some modifications, covers the whole ground of the former law. It provides for the formation of banking associations, and, when organized, declares them to be corporations. To pass this amendment the constitutional majority was necessary. At the time this amendment was passed the Detroit City Bank, as appears from the declaration, had been organized and was in operation. And the 36th section of the amendatory act declares that "all banking associations, incorporated under the act to which that was an amendment, shall, within ninety days from the passage of that act, give the security required by the sixth section of that act, and shall, in all other respects, be subject to, and governed by, the provisions of that act." The 6th section required "bonds and mortgages to be given to the Auditor General, for the use of the State, as collateral security for the final payment of all debts and liabilities of such associations."

Here is a direct legislative sanction of the incorporation of the Detroit City Bank, and all other banking associations under the first law. And the provisions of the amendatory law are extended expressly to all such incorporated companies.

If it were then admitted that under the first act the associations formed were not incorporated, are they not incorporated by the second? Its provisions confer corporate powers, and they apply to associations then subsisting under the former law. This designates these associations with as much certainty as if they had been specially named in the amendatory act; and can there be any doubt that this act would confer corporate powers on these associations if, under the former, they had not received them? As it regards banking associations then subsisting, it could not be contended that the Legislature disregarded the restrictions of the constitution, by creating or authorizing an indefinite number of banks. These institutions were in operation, they were known, and expressly sanctioned, and provisions, which conferred corporate powers, were made to embrace them.

Thus it would seem, that, in a double aspect, the institution, in question, may claim corporate powers.

We will now examine the objections to the declaration.

There can be no doubt that, if the plaintiffs are entitled to recover, they may recover in the action of debt. This is not controverted. But it is objected that the averment of the existence of the bank, as a corporation, is not positive, but by way of recital, as, whereas, &c.

This objection might be urged in an action of tort, but it does not lie where the action is founded on contract. 2 Chitt. Pl. 236. 1 Chitt. Pl. (edt. 1837,) 286, 380. *King v. Roxbrough*, 2 Crom. and Jer. 418. 2 Tyr. 486. Indeed, it has been doubted in some modern decisions, whether this objection,

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even in actions of tort, should be sustained, when raised by a special demurrer.

The second objection is, that there is no averment that the defendants became a body politic and corporate.

There is no formal averment of this fact, but we think the facts, stated in the declaration, show that, under the law, the directors and stockholders of the Detroit City Bank did become a body corporate and politic. And, from such statement, the inference of law arises without a special averment.

It was unnecessary to aver that the law was passed by the constitutional majority in each House. That question is not now before us.

It is again objected that there is no averment that the defendants were elected directors, and were duly qualified to act as such.

On the part of the defendants, it is contended, that this is essential. That the defendants are charged to have incurred a penalty under the law, which the plaintiffs seek to recover; and that they must be brought strictly within the law.

By the 21st section of the amendatory law, it is declared that, "for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place, shall be liable, in their individual capacity, to the full amount which such insolvent association may be indebted." And it is under this provision the present action has been brought.

It is contended by the plaintiffs' counsel that the defendants are estopped to deny that they acted as directors. The doctrine of estoppel would seem to have no application in the present state of the pleadings. If by plea they should deny their own authority to act, after having acted as directors, the question whether they were not estopped might arise. But the question is now on the sufficiency of the declaration, and

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it is clear that the plaintiffs must show every thing material to the maintenance of their action.

After stating that subscriptions were received, &c., the declaration alleges that the defendants were elected directors, and that they entered into the duties of their offices respectively. That they continued to act as directors until the bank became insolvent. And the plaintiffs aver that the defendants, as directors, became liable to pay their demand, under the amendatory act. The protest of the bill is, also, averred, and that due notice was given.

We think that, in this respect, the allegations of the declaration are sufficient. They show specifically the grounds of action, in a form sufficiently technical, against the defendants as directors.

It is objected that the provisions of the amendatory act are retrospective, and, therefore, void. That it impairs the obligation of the contract, or is in the nature of an *ex post facto* law.

The bill of exchange, on which the action is brought, bears date the 6th December, 1838, which was long after the amendatory law took effect. And it is difficult to perceive how this law can be considered as impairing the obligation of the contract.

Under the first law the directors were made personally responsible for the debts of the institution, should it become insolvent after exhausting its effects. This, though not the express provision of that act, is understood to be the settled construction of it. But under the amendatory law, in the event of insolvency, the directors are made personally responsible in the first instance.

If the amendatory law made the defendants liable for a debt, on grounds which existed before its passage, and on which, as the law stood, they were not liable, there would be

great force in the objection. It would then appear that the law attempted to create a liability which did not before exist. The Legislature may create a remedy for an existing obligation, but they can not, by legislation, create an obligation on a past transaction. And more especially they can not subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility.

But as the case now stands this question does not arise. The obligation, if incurred by the defendants, was incurred under the law. Under its provisions, from the declaration, the defendants appear to have acted as directors, and to have incurred the liability, which this action is brought to enforce.

The defendants again object, that it does not appear from the declaration that the demand, for which the action is brought, is subsisting against the bank, but we think this sufficiently appears. The bill of exchange, drawn by the bank, is set out, that it was protested for nonpayment, at maturity, and due notice given to the bank. Here, then, is a liability on the part of the bank, as the drawer of the bill, clearly and technically shown.

The declaration avers that, "by force of the statute in such case made and provided, an action has accrued to the plaintiffs, &c., and it is insisted that, as the action is founded on two statutes, the averment should have been by force of the statutes." And 1 Chitt. Pl. 406, is cited where it is said, "the words whereby and according to the form of the statute will not suffice when the action is founded on two statutes." Hawk. 71. Com. Dig., action on statute, H. But Mr. Chitty adds, "where, however, a statute refers to a former act, which adopts and continues the provisions of it, the declaration should conclude only against the form of the statute." 1 Saund. 135, n. 3. 2 Saund. 377, n. 12. 7 East. 516.

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The action of the plaintiffs is founded on the second and amendatory act, so that it appears the averment is strictly technical.

Demurrers withdrawn, and leave to plead, &c.

BENJAMIN vs. TILLMAN.

The acceptance of a bill is evidence against the acceptor, in behalf of the drawer, of so much money, under the money counts.

In a bill of exchange, or other negotiable instrument, the words value received are not necessary.

Mr. *Cooper* appeared for the plaintiff, and Mr. *Joy* for the defendant.

OPINION OF THE COURT.

This is an action of assumpsit, the general counts for money had and received, lent, &c., only, being contained in the declaration.

The plaintiff offered, in evidence, a bill drawn by him, payable to Lansing, and accepted by defendant, but which did not contain the words value received, and, on that ground, it was objected to.

The question is, whether this bill is evidence under the money counts.

A bill, as well as a note, is prima facie evidence for money had and received by the drawer or maker to the use of the holder; and, on acceptance, is evidence of money had and received by the acceptor to the use of the drawer. 1 Salk. 283. *Grant v. Vaughan*, 3 Burr. 1,516. Bayl. (5 edit.) 357.

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7 Wheat. 35. 3 Gill and Johns. Rep. 369. *Pattock v. Harris*, 3 Term Rep. 174. *Vese v. Lewis*, 3 Term Rep. 182.

It was decided, in *Hardress*, 485, that debt would not lie by the payee of a bill of exchange against the acceptor. And in the case of *Gibson v. Minet*, 1 H. Bla. 602, Eyre, C. J. said, "that the presumption of evidence which a bill of exchange affords has no application to the assumpsit for money paid by the payee or holder of it, to the use of the acceptor; and that it must be a very special case which will support such an assumpsit." 3 East. 177.

In the case of *Barlow v. Bishop*, 1 East. 434, 435, it was held, that the plaintiff can, in no case, recover under the general count, unless money has actually been received by the party sued, and for the use of the plaintiff; and, also, in the case of *Wayman v. Bend*, 1 Camp. 175.

In the case of *Raborg v. Peyton*, 2 Wheat. Rep. 385, the Court say—"prima facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of those funds for the use of the holder. And, again; "we are, therefore, of opinion that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor, when it is expressed to be for value received."

In the cases of *Smith v. Smith*, 2 John. Rep. 235, and *Saxton et al. v. Johnson*, 10 John. Rep. 418, it was settled, that a note not negotiable was admissible in evidence under the count for money had and received.

As between each party to a bill of exchange, or negotiable promissory note, and every other party, there is a sufficient privity in law; and as such negotiable contract is presumed to be a cash transaction, and, as a money consideration, is presumed to pass at the making, and at each indorsement of the instrument, each party, liable to pay, is held responsible, as for

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so much money had and received to the use of the party who is, for the time, the holder, and entitled to recover. SHAW, Chief Justice. *Ellsworth v. Brewer*, 11 Pick. 316. *State Bank v. Hurd* 12 Mass. Rep. 172. *Butler v. Wright*, 20 John. Rep. 367.

It will be seen, from the above citations, that there is great contrariety in the authorities, as to what shall be evidence under the money counts. The more modern English authorities, which, however, are not altogether consistent, limit the evidence to a money transaction between the parties on the record, whilst the American authorities give a more liberal view, and many of them require nothing more than an indebtedment.

In the case under consideration the plaintiff being the drawer of the bill, which the defendant accepted in favor of Lansing, and the plaintiff, being now the holder of the bill is, *prima facie*, entitled to recover. And we think that the acceptance is an admission by the acceptor, that he has received from the drawer the amount of the bill.

It is, however, contended that as the words "value received" are omitted in the bill, that it does not afford *prima facie* evidence of indebtedment. But the law is well settled that, in a negotiable instrument, these words are not necessary. *Grant v. Da Carta*, 3 Maul. and Sel. 352. A declaration on a bill of exchange was demurred to, because it was not stated to have been given for value received, but the Court said it was a settled point that it was not necessary, and gave judgment for the plaintiff. *Papplewell v. Wilson*, 1 Stra. 264. *Claxton v. Swift*, 2 Shaw, 496, 497. *Mackleod v. Snee*, Lord Raym. 1481. Chitt. on Bills, (edt. 1839) 182.

Where a note or bill is not declared on, but is used as evidence, under the money counts, it is said to be less conclusive than where the action is founded upon it. That it is used

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as a paper from which the jury may infer so much money was lent, paid, or had and received, or that an account was stated. *Storey v. Atkins*, 2 Stra. 725.

The jury found for the plaintiff. Judgment.

AMES AND AMES vs. LE RUE

If the plaintiff fails to prove the special contract stated in his declaration, or the contract has been performed on his part, and a duty is imposed on the defendant to pay, in money, the amount due the plaintiff may recover on the general counts.

If the special contract be barred by the statute of limitations, and the plaintiff can show an express promise to pay, since which the statute has not run, he may recover on such promise.

And, in such case, the facts of the special contract may be gone into, to show the balance due.

It has been held that a note payable in specific articles is admissible in evidence, under the money counts.

Messrs. *Jones* and *Williams* appeared for the plaintiffs, and Mr. *Frazer* appeared for the defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit, brought to recover the price of a paper machine, sold by the plaintiffs to the defendant. The declaration set out the special contract, and the common counts were added. Defendant pleaded the general issue, and the statute of limitations.

In support of the first count in the declaration a receipt was offered in evidence, from the defendant to the plaintiffs, in which the defendant stipulated to pay two hundred dollars in three months, two hundred in six months, and two hundred dollars in nine months, to be paid in wrapping paper, and these

payments being made the machine was to be the defendant's. This contract was dated in 1826.

A part of the wrapping paper, of an inferior quality, was delivered; and, after some years of delay, the defendant expressly promised to pay the residue of the debt, or provide for the payment of it.

It is contended that the sale of the machine was conditional, and not absolute; and that no action will lie upon the contract. By the contract the seller had a lien upon the machine for the purchase money. When paid for it was to be the property of the purchaser. But the payments were to be made in the manner, and at the times, prescribed; and, if not so made, the defendant was liable to be sued for a breach of the contract.

The statute of limitations, it is insisted, bars a recovery on the special contract. And here a question is made, whether the case comes under the statute of the State where the contract was made, or where it is sought to be enforced. The statute of limitations of the State where the suit is brought must govern. It is the law of the forum, and applies in all cases where the jurisdiction of the forum is invoked.

The statute of Michigan does bar all remedy upon the special contract. Since the breach of the contract, and before the commencement of this suit, the limitation of the statute has run, and, consequently, the bar is complete. But after the delivery of the wrapping paper, in part, and before the statute had run, the defendant, as appears from the written evidence, promised to pay the balance due. And this promise, if valid, is not barred by the statute.

It is contended that this promise, at most, could only relate to the former contract, and the mode of payment therein provided. But is this the true construction of the promise? The payments, in wrapping paper, were all to be made in nine

months. After this period the plaintiffs were under no obligations to receive the paper, nor could the defendant expect to pay it. And, on being called on for payment by the plaintiffs, several years after the nine months had expired, and threatened that, unless he paid the balance, the machine would be taken from him, he promised to pay it.

That there was a valuable consideration for this promise will not be denied. And that the promise was to pay in money is equally obvious. The special contract, in regard to the sale of the machine, is properly shown as the consideration of the express promise; and as this promise was to pay money, we think it is evidence for the jury, under the count, for the sale of the machine.

The plaintiffs, it is alledged, has failed to prove the special contract as laid in the declaration. This, if admitted, would give them a right to go on the general count. And we think the plaintiffs have a right to recover on the express assumpsit, since which the statute has not run; and that the whole circumstances of the case may be gone into to show the amount due.

The case is clearly within the rule that, where the contract has been performed by the plaintiff, and a duty is imposed on the defendant to pay the amount due, in money, a recovery may be had on the general count, although there was a special contract. *Chesapeake and Ohio Canal v. Knapp et al.*, 9 Peters, 541.

On the authority of *Smith v. Smith*, 2 John. Rep. 235, *Pierce v. Crafts*, 12 John. Rep. 90, the Court held, in the case of *Crandall v. Bradley*, 7 Wend. Rep. 311, that a note payable in specific articles was admissible in evidence under the money counts. This was a departure from the English rule.

The jury found for the plaintiffs the balance due. Judgment.

The United States v. William Vansickle.

THE UNITED STATES vs. WILLIAM VANSICKLE.

To discredit a witness it is not competent to prove general bad character, disconnected with his veracity.

The proper inquiry is, what is the general character of the witness, where he resides, for truth.

And the witness, under examination, may be asked, from your knowledge of his general character, would you believe him under oath.

Particular facts, of a criminal nature, cannot be proved to discredit the witness. The inquiry must be general.

The *District Attorney* appeared for the United States, and Mr. *Bates* for the defendant.

OPINION OF THE COURT.

The defendant was indicted for knowingly and corruptly obstructing the marshal, in the service of a subpoena, on a witness, in certain criminal cases, in which he, with others, was defendant, under the twenty second section of the act of Congress of the 30th April, 1790. The plea of not guilty was entered, and a jury were called and sworn to try the issue.

Remember Lummis, a witness, stated that the defendant took her from place to place while the marshal or his deputy was in pursuit of her to summon her as a witness. That the defendant had frequent interviews and conversations with her, whilst she was kept out of the way, and that he proposed to give her a tract of land if she would avoid the process; and he represented to her that if the process were served she would be taken to Detroit and confined in jail, unless she could give bail for her appearance.

By this means the process was eluded for some weeks, until the witness became dissatisfied and resolved to appear, and communicated such intention to those who found means to aid her determination.

Other witnesses, called by the prosecuting attorney, in many important particulars, corroborated the statements of this witness.

The witnesses on the part of the defendant were sworn and examined, chiefly with the view to discredit Remember Lummis, the principal witness for the prosecution. And a question was made as to the form and substance of the questions to be propounded to the impeaching witnesses.

On the part of the defendant it was contended, that they had a right to examine into her general character and standing in society; and, particularly, whether she was not a lewd woman in general estimation.

On the other side it was insisted, that the questions must be limited to the general character of the person impeached as to truth and veracity; and whether the witness, from his knowledge of her character, would believe her under oath.

It is singular that there should be great contrariety in the decisions on this question, which is of almost daily occurrence in the administration of justice. All the authorities agree that the inquiry must be general, whether it relate to veracity or to character in a more enlarged sense. A witness is compelled to appear and testify, and it would be most unjust to permit specific facts to be proved against him, of which he has had no notice, and which materially affect his reputation. Every individual is supposed to be able, at all times, to establish or defend his general character; which is nothing more than the prevailing opinion of the community where he resides. For this charge being made in a general form, may be met and refuted in the same manner.

The regular mode of examining into general character, says Phillips on Evidence, (1 vol. ed., 1839, 292) is to inquire of the witnesses whether they have the means of knowing the former witnesses' general character, and whether, from such knowl-

edge, they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine those witnesses, as to their means of knowledge and the grounds of their opinion.

In the case of *Hume v. Scott*, 3 Marsh. 260, the proper question was held to be, "what is the general moral character of the witness?" and, in their opinion, the Court say that the jury may draw unfavorable inferences as to the truth of the witness, from his general turpitude. In the case of *The People v. Herrick*, 13 John. Rep. 84, the reasoning of the Court would seem rather to sustain the above position. They say the conviction of an infamous crime, as petit larceny, would as much destroy the credibility of a witness as if it related to his truth. *The State v. Boswell*, 2 Dev. 209. You may prove the witness to be of bad moral character. The question need not be restricted as to his veracity. To the same effect is the case in 1 Hill's Rep. 251, 258-9. And in the case of *The Fulton Bank v. Benedict*, 1 Hall. Rep. 558, the Court say—to inquire only as to general character for truth seems too narrow.

But the weight of authority limits the inquiry to the veracity of the witness impeached; and it seems the question as to general character is too vague. The witness cannot advert to particular facts, or to his personal knowledge, of the character of the individual impeached, but to his general reputation for truth. This reputation is general character. To form a general character as to truth it is not necessary that the individual should have sworn falsely, or, indeed, that he should ever have been examined as a witness. The public opinion is by no means limited to this, as to a man's veracity. It is formed by combining the elements of his character; and it is this result of the public mind which is to impeach the witness.

A man who is notoriously immoral, who is believed to be dishonest, and who is addicted to misrepresentation, can never have a good character for truth. And as it regards defects of character, that community has yet to be discovered which does not feel, at least, as strong an interest in the investigation of a man's faults as his virtues. The character of every man is known in the community where he resides. His acts, whether good or bad, have been scrutinized, and, in most instances, if not in all, an opinion has been formed as to his veracity. It is this opinion which is evidence, and not the particular circumstances which led to the formation of such an opinion. In behalf of the witness these circumstances may be inquired into to show, that they originated in the controversy then pending, or that an erroneous impression had been made on the public mind.

It is said in some of the cases cited, that the inquiry as to the veracity of the witness is too limited; and that the inquiry should be as to character generally. That if the answer shall be—the witness sustains a bad character, the question may then be asked, in behalf of the witness, whether the character spoken of is in regard to his veracity. But if general character, without limitation, is the object of inquiry, why suffer it to be thus qualified? If the question as to the veracity of the witness be proper, in support of the witness, to explain or do away the effect of general bad character, does it not show that it is the question, and the only question, which should, at first, have been propounded. This is incontrovertible, unless bad character in the abstract, and without reference to truth, be proper evidence.

Now what shall constitute bad character? Shall the witness be questioned on this point? And if he be, may he say that the witness impeached is generally believed to be a com-

mon prostitute. That this was proper was decided in the case of *The Commonwealth v. Murphy*, 14 Mass. Rep. 387.

This, however, was overruled in the case of *The Commonwealth v. Moore*, 3 Pick. 194. In the case of *Evans v. Smith*, 5 Mon. 365-6, unchaste character was held admissible to impeach a witness. But this decision is believed to be against the whole current of authorities, English and American.

We do not mean to say that the chasteness of the witness may not become a proper question on an indictment for a rape, or in a case which may be supposed; but that it is not a proper question, under ordinary circumstances, to discredit a witness. If such a question be proper, shall it be limited to the character of a female? Must it not as well apply to the other sex?

Again, the question is asked, what shall constitute general bad character. In some communities a mason or an anti-mason, an abolitionist or anti-abolitionist, a man who plays cards or engages in horse racing, may be esteemed, as the opinions of the majority in the neighborhood may preponderate, to have an immoral or bad character.

Shall this opinion then, of bad character, so indeterminately formed, be evidence on which to destroy the credit of a witness. If this opinion be evidence, it is so without showing the basis on which it rests. For, as has been shown, it is unnecessary, if it be not improper, in the first instance, to prove how this opinion has been formed. Is it evidence in the broadest sense, without explanation or restriction? That it is evidence so far as bad character has, in the public opinion, affected the veracity of the witness, is admitted. But is it evidence independently of this?

The witness must be impeached, not by proving particular facts, for these he is not supposed to be prepared to meet, but by showing his general character in the public estimation. Facts are not to be proved from which the jury may infer a

bad character, but it is the inference, drawn by the public, which is evidence. An inference already drawn and embodied in the public opinion, and which, as a fact, is susceptible of proof. Now what is the fact thus to be proved? Is it as to the bad character of the witness generally, or his bad character as to veracity.

The object of the examination would seem to be a sufficient answer to this inquiry. It is to shake and overthrow the credit of the witness. Now this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility, be proved as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. And would it not be a most dangerous species of evidence? It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence.

Ancient boundaries may be proved by reputation. But is this done by proving the existence of any facts, in public opinion, short of the boundaries.

Marriage is often proved by reputation. The fact of living together as man and wife, and being so recognized by each other and the public, is received as evidence of marriage. But this is a legitimate inference arising from the facts proved. Living together and recognition are not established as a matter of reputation, but as facts, distinct from public opinion. And from these facts a jury may infer, as well as the public, that the parties were married.

And the same rule applies as to proof of pedigree by reputation.

If it were competent to prove that the impeached witness was a common prostitute, had been guilty of stealing, or of any other infamous crime, the inference that she is unworthy of credit might be legitimate. But these things, if true, cannot be established either by proof of the facts, or that they are believed to be true in public opinion. The inquiry, it is insisted, must be general as to character, and if that, in the public estimation be bad, however it may have been formed, and without the least reference to the veracity of the witness, it is evidence to shake and overthrow that veracity. As the rule now stands, we think, a witness can only be impeached, under this head, by proof of general character as it regards his veracity.

The impeaching witness may be asked if he is acquainted with the general character of the impeached witness. If he answer in the affirmative, he should then be asked whether, as it regards his veracity, it be good or bad; and if bad, whether, from his knowledge of the prevailing opinion of the public, he would believe the witness under oath.

Witnesses were examined under the rule here laid down to impeach and to sustain Remember Lummis. The jury found the defendant guilty, and he was sentenced accordingly.

William M. Halsted v. Edward Lyon.

WILLIAM M. HALSTED vs. EDWARD LYON.

On a note, payable to James A. Hicks or bearer, suit may be brought in the name of the bearer.

The transfer of such a note is not within the 11th section of the act of 1789, which prohibits the assignee from suing, in the courts of the United States, unless the assignor could have sued in said courts.

Possession of a note, payable to bearer is, prima facie, evidence of right. And further proof is not required, unless under suspicious circumstances. Such circumstances must be shown by defendant.

The holder of a note, payable to bearer, may sue in his own name, with the consent of others, who may be interested in the note.

A plea is bad which states facts that amount only to the general issue.

It is bad, if it set up two distinct matters of defence, either of which is sufficient to defeat the plaintiff's action.

So, a plea is bad which sets up matters in defence, and neither denies nor admits, and avoids the plaintiff's allegation. It should give color to the plaintiff's right.

Messrs. *Barstow* and *Lockwood* appeared for the plaintiff, and Messrs. *Romeyn* and *Atlee* for defendant.

OPINION OF THE COURT.

THIS action is brought on a promissory note, in which the defendant promised to pay James A. Hicks, or bearer, eleven hundred and sixteen dollars and six cents, for value received, with interest, one year after the 23d May, 1839. And the declaration avers, that the said James A. Hicks then and there delivered, and transferred the said note to the plaintiff, for value received, who became, and is still, the lawful bearer thereof.

The defendant pleaded—

First: The general issue;

Second: That Hicks, the payee, when the note was given, and still is, a citizen of Michigan, and that the note was by him assigned to William M. Halsted, Richard T. Haines, Matthias

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C. Halsted, Richard J. Thorn and James M. Halsted, who still are the owners and holders thereof, which he is ready to verify, &c.;

Third: That Hicks was, and is, a resident of the State of Michigan, and that the defendant is a citizen of Michigan; that Hicks assigned the mortgage to William M. Halsted and the others, as above stated, and delivered it, together with the note, to the assignees, &c.

To the second and third pleas the plaintiff demurs, and assigns, as cause of demurrer to the second plea, that it does not confess and avoid, or traverse and deny, any material fact in the declaration, which it was necessary to alledge. And that the third plea does not put in issue any material fact alledged, or necessary to be alledged, in the declaration; that it is equivalent to the general issue, and is argumentative and evasive. The defendant joined in demurrer.

The bearer of a bill or note originally payable to bearer, has, in general, only to produce the instrument; though, under suspicious circumstances, the bearer of a note, transferrable by delivery, may be required to prove that he, or some person under whom he makes his title, took it bona fide, and gave a valuable consideration for it. Doug. 632. *Grant v. Vaughan*, 3 Burr, 1627. Chitt. on Bills, (ed. 1839) 626. In the case of *The Bank of Kentucky v. Winter and others*, 2 Peters, 327, the Court say, they have uniformly held that a note payable to bearer, is payable to any body, and not affected by the disabilities of the nominal payee. And, in the case of *Ballard v. Bell*, 1 Mason, 243, it was held, that the Circuit Court had jurisdiction of an action brought on a bank note, payable to W. Pitt, or bearer, by the holder, a citizen of one State against the citizen of another, without showing that W. Pitt is a fictitious person, or a citizen of a State different from the defendant—

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the prohibition contained in the 11th section of the act of September 24th, 1789, not applying to such a case.

The rule is, that the bearer of a note or bill payable to bearer, need not prove a consideration, unless he possess it under suspicious circumstances. If a question of mala fide arises, that is a fact to be raised by the defendant, and submitted to the jury. *Mouran v. Lomb*, 7 Cowan's Rep. 174. *Conray v. Warren*, 3 John. Cases, 259. *Payne v. Eden*, 3 Caines' Rep. 213.

There is nothing in the law which forbids the holder of a negotiable note, after it has been indorsed, from suing it in the name of another, with his consent, provided it is unattended with any circumstances of fraud and oppression. Nor is it unlawful for another person to institute such suit in his own name, with the privilege and consent of the party beneficially interested. 2 Am. Com. Law, 324.

We will now apply these principles to the points raised, in this case, by the pleadings.

The objection to the second plea, is, that it does not confess and avoid, or traverse and deny, any material fact in the declaration, which it was necessary to alledge. In this plea, it is averred that Hicks, the payee of the note, at the time it was given, also, when it was assigned to William M. Halsted and others, was, and still is, a citizen of Michigan, and that the assignees are the holders thereof.

In what way the note was assigned, whether by indorsement or delivery, the plea does not state; nor is this material. The action is brought by the plaintiff, as bearer. There is no allegation in the plea which creates a suspicion that the plaintiff is not a bona fide holder. For, if the fact be admitted that the other assignees have an interest in the note, the action, by their consent, may be sustained in the name of the plaintiff. He has possession of the note, and his right to maintain the action will

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be presumed, as bearer, or, with the consent of the other parties in interest, until the contrary appear.

In an action brought on a note payable to bearer, the declaration need not alledge of whom he obtained it, but that he came into the possession of it bona fide. He is not obliged to prove the consideration paid, except under suspicious circumstances; and these are to be shown by the defendant.

The note, under consideration, was payable to Hicks or bearer. Now, if the note had been indorsed by the payee to the plaintiff, and he had brought his action on the assignment, he would have been bound to prove it. *Waynam v. Bond*, 1 Camp. Rep. 175. *Rex v. Stevens*, 5 East's Rep. 243. Chitt. on Bills, (ed. 1839) 626. Though the note had been assigned by indorsement, the action might have been brought, as bearer, without alledging the assignment.

The drawer promises to the bearer, as well as to the payee, and no indorsement by the latter can affect the obligation incurred by the drawer. There is a privity between him and the bona fide holder. The promise is to him, and, on a general count for money had and received, the note is evidence in an action against the drawer by the bearer.

In the case of *Sere et al. v. Pital et al.*, 6 Cranch Rep. 332, the Court held, that a general assignee of an insolvent can not sue in the Federal Courts, if his assignor could not have sued in those courts. That was a case where an alien, who was the assignee of an insolvent citizen of New Orleans, brought suit, in the District Court of the United States, against a citizen of the same place. The Court, in that case, did not seem to think it was clear of doubt; but it was altogether different from the case under consideration.

The assignee of the insolvent represented the right of his assignor. He could set up no other right. It was through the assignment only, that he could maintain his action. He acted

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in a fiduciary capacity. But the plaintiff, in this case, brings the action in his own name, and in his own right. He relies upon the promise made to him as bearer of the note, and not on the promise made to Hicks. The plaintiff, then, asserts no right under an indorsement, but a right in himself; a right made complete by a mere delivery of the note, in the course of business, the same as a bank note which passes by delivery. In principle, there is no difference as to the right of the bearer, between a bank note and any other promissory note, or bill payable to bearer.

From these considerations it appears that the facts, stated in the second plea, do not go to destroy the plaintiff's action.

The delivery of the note by Hicks, or its transfer, is not within the act which restricts the right of the assignee, as to bringing suit in the courts of the United States, to the right of the assignor. Hicks, being a citizen of Michigan, could not have brought this suit against the defendant, on account of his being a citizen of the same State; but this does not affect the plaintiff, who is a citizen of New York, and who sues as bearer. Nor is there any thing in the plea which controverts the right of the plaintiff to maintain this suit, in his own name, if the other persons named have an interest in it.

The third plea differs from the second, only, in alledging that a mortgage was given to secure the payment of the note, which was assigned, by Hicks, to William M. Halsted, and the other persons named, and that the note, with the mortgage, was delivered to them.

The objection to this plea, is, that it does not put in issue any material fact alledged, or necessary to be alledged, in the declaration; and that it is equivalent to the general issue, and is argumentative and evasive.

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This plea does not alledge an assignment of the note, but that it was delivered to the persons named, with the mortgage, which was assigned.

Now, these facts are less strong against the right of the plaintiff to maintain this suit, than those set forth in the second plea. That plea contains an averment, that the note was assigned by Hicks; the third plea, that it was delivered. Now, according to the third plea, it passed to the above persons by delivery; but this does not show that the plaintiff is not now the bona fide bearer of the note.

There are, in fact, no allegations in the third plea which are not already answered in the considerations applicable to the second.

There is another objection to these pleas, which would be fatal, even if the matters alledged, properly pleaded, would have abated the plaintiff's suit.

In each of the pleas two distinct grounds are set up against the plaintiff's right to maintain his suit: One, that the assignor, being a citizen of Michigan, where the suit was brought, could, under the act of Congress, assign no interest to the plaintiff which would give him a right to sue in the Circuit Court; and, the other, that the plaintiff is not the holder of the note.

Now, if the assignment were within the act, this objection would be fatal to the plaintiff's suit; and so would the other objection be fatal, if it were shown that the plaintiff was not the bona fide holder of the note.

Neither of these pleas deny the allegations of the declaration, nor do they admit and avoid them. The facts are pleaded in abatement, or, according to the form of the pleas, in bar of the plaintiff's action, without giving color to his right. And this is a fatal defect.

It is plain, that a plea which shows new matter in avoidance, or discharge of the plaintiff's allegations, is double and argu-

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mentative, if it do not admit the apparent truth of these allegations as matter of fact. There can be no occasion to adduce grounds for defeating the operation of disputed facts. The plea in avoidance must, therefore, give color to the plaintiff. Chitt. Pl. (ed. 1827) 556.

Where the defence consists of matter of fact merely, amounting to a denial of such allegations in the declaration as the plaintiff would, on the general issue, be bound to prove in support of his case, a special plea is bad, as unnecessary, and amounting to the general issue—first, on the ground of its prolixity; and, secondly, if viewed as a plea in confession and avoidance, it does not give color, or a plausible ground of action, to the plaintiff. 1 Chitt. Pl. (ed. 1827) 556.

The defendant can not, in answer to a single claim, rely on several distinct answers; nor can he do so in one plea. Thus, in a plea of outlawry, the defendant can not state several outlawries, because one would be sufficient to defeat the action. Carth. 9. 1 Chitt. Pl. (ed. 1827) 260.

It is insisted, that the demurrers to these pleas are not special. They might have been drawn with more formality, but they are sufficiently so to bring up the points above discussed. The principal defect alledged, is, that they do not state, with the requisite precision, the grounds of the demurrer. But facts are stated, from which the law infers legal consequences, and this is sufficient.

Whether these pleas, therefore, be considered as stating facts which amount only to the general issue, as setting up two distinct grounds of defence, or, as pleas in confession and avoidance, they are defective.

The demurrers to these pleas are sustained.

Crum v. Abbott and Layton.

CRUM vs. ABBOTT AND LAYTON.

Goods were purchased by one of the defendants, for which a promissory note was given; afterwards he entered into partnership with the other defendant, and by the consent of both partners and the holder of the note, the words, "and company," were added to make the note stand against the firm; held, the note was binding on the company.

Mr. *Frazer* appeared for the plaintiff, and Mr. *Abbott* for the defendants.

OPINION OF THE COURT.

This action is brought on a promissory note, signed by S. M. Layton & Co., and on account; the general issue was pleaded, and, on the trial, it was proved that the note was first signed by S. M. Layton, and that, some time after it was due, the defendants having entered into partnership, and received the goods, for which the note was given, into the firm; the signature of the note was altered, with the consent of all parties, by adding, "and company."

An objection was made to receiving the note in evidence, on the ground that the goods were purchased by Layton, in the first instance, and Abbott, though subsequently a partner, could not be held liable for them.

In order to subject a person to liability, as a partner, he must have been a partner, or appeared so, at the date of issuing of the bill, or making the contract. *Dalman v. Orchard and another*, 2 Cor. and Payne, 104. *Saville v. Robertson*, 4 Term Rep. 720.

The first of these cases arose on an acceptance of a bill, by one of a firm which had been dissolved, and the Court, very properly, held that it was not binding on the late partners.

The second case was an issue directed out of chancery, and it was held, that acts subsequent to the time of delivering goods on a contract may be admitted as evidence to show that the goods were delivered on a partnership account, if it were doubtful at the time of the contract. But if it clearly appear that no partnership existed, at the time of the contract, no subsequent act by any person, who may afterwards become a partner, not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods, will make him liable for goods sold and delivered, though all the judges held that he would be liable on the bills of exchange.

Lord Kenyon said he entertained no doubt, if the action had been on the bills of exchange, which had been accepted by the company, that the plaintiff might have recovered. And of this opinion were the other judges.

That case involved the same principle as the one under consideration.

When the contract was made for the purchase of the goods the partnership had no existence. It was afterwards formed, and included the property purchased, and, in payment of it, bills of exchange were accepted by the company.

When the debt was contracted it was an individual debt, and for which the company formed subsequently were not responsible. A parol assumpsit of the company to pay this debt would not have bound them, as it was, technically, the debt of another; and the parol promise would have been void under the statute of frauds. But by the acceptance of the bills of exchange, by the company, there was a promise in writing, and there was a good consideration to support the promise. And so in the case under consideration. The goods were purchased by Layton, and the debt was his. But afterwards Layton and Abbott formed a partnership, and the same goods

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became the property of the firm. And with the consent of both partners, and the holder of the note given by Layton for the goods, the words, "and company," were added to make the note good against the firm. This was done after the note was due, but this can constitute no ground of objection. It was an undertaking by the firm to pay the note, and it was founded upon a valuable consideration.

The transaction may be unusual, and certainly required explanation, but, when explained, it appears to have been fair and equitable.

In the case of *Westcott v. Price*, Wright 220, the Court held that drafts may be drawn on a firm by name, in anticipation of a partnership, and if accepted, after one is formed, the acceptance binds the partnership.

Upon the whole, if the jury shall find the facts as above stated, they will find for the plaintiff, and a verdict for the plaintiff was accordingly rendered by them.

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In an action between the holder of a bill of exchange and the acceptor, the bill is evidence, under the general money counts.

So it is evidence between the holder and a remote indorser.

There is a privity between the holder and the other parties to the bill, which enables him to sustain an action of indebitatus assumpsit against them.

In an action between the holder and the indorsers, the maker of the note, the defendants having released their costs, is a competent witness to prove that the note, after it was signed by him and passed out of his possession, was altered in a material part.

But he is not competent to impeach the note by any facts, within his knowledge, at the time the note was made.

His testimony must be limited to facts subsequently to his agency in the formation and negotiation of the note.

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Mr. *Frazer* appeared for the plaintiff, and Messrs. *Buell* and *Witherell* for the defendants.

OPINION OF THE COURT.

This suit is brought by the plaintiff as the indorsee and holder of a note against the defendants as remote indorsers. To a count on the indorsement are added the common money counts.

In the course of the trial a question was raised, whether the note is admissible in evidence for the plaintiff as indorsee against the defendants, who are remote indorsers, under the general money counts.

Where a bill of exchange was drawn by defendant and others, on the defendant alone, in favor of a fictitious person, and the defendant received the value of it from the second indorser, it was decided that a bona fide holder, for a valuable consideration, might recover the amount of it, in an action against the acceptor for money paid, or money had and received. *Tatlock and another v. Harris*, 3 Term, 85. 1 East. 102. 3 Bos. and Pul. 560.

If a bill of exchange be drawn in favor of a fictitious payee, and that circumstance be known as well to the acceptor as the drawer, and the name of such payee be indorsed on the bill, an innocent indorsee, for a valuable consideration, may recover on it against the acceptor, as on a bill payable to bearer. *Minet and another v. Gibson and another*, 3 Term Rep. 272. 1 East. 434. 1 H. Bl. Rep. 569.

In the case of *Mandeville v. Welch*, 5 Wheat. Rep. 277, the Court say—in all cases where the bill can be used as evidence, either against the parties, or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. And in the case of *Page's Adm. v.*

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The Bank of Alexandria, 7 Wheat. Rep. 35, the Court remark—there are certainly cases in which a promissory note, or an indorsement of such note, may be offered in evidence, against the maker or indorser, under a count for money had and received, and if unconnected with other circumstances may be sufficient proof, in itself, to charge the defendant.

An action of debt will lie by the payee or indorser of a bill of exchange, against the acceptor, where it is expressed to be for value received. *Baborg v. Peyton*, 2 Wheat. Rep. 385.

The indorsee of the payee of a negotiable note can maintain an action for money had and received against the maker of the note, upon the proof of the note and indorsement. *Penn v. Flack and Cooley*, 3 Gill. and John. Rep. 369. *Young v. Adams*, 6 Mass. Rep. 189. *Wilde v. Fisher*, 4 Pick. Rep. 421. The indorsement of a cash note, of which the maker had notice and undertook to pay, establishes a privity of contract between indorsee and maker, and is legal proof of money held by the maker to the use of the holder. *Ramsdell v. Soule*, 12 Pick. Rep. 126. *Cole v. Cushing*, 8 Pick. Rep. 48. So money had and received lies by the holder of a note made payable to bearer. *Pierce v. Crafts*, 12 John. Rep. 90. *Cruger v. Armstrong et al.*, 3 John. cases 5. *Grant v. Vaughan*, 3 Burr. 1516.

To maintain assumpsit there must be a privity between the parties, but it may be a privity in fact or in law. Between each party to a bill or negotiable note, and every other party, there is a sufficient privity in law; and each party liable to pay, is held responsible as for so much money had and received to the use of the party who is, for the time, the holder and entitled to recover. *State Bank v. Hurd*, 12 Mass. Rep. 172. *Ellsworth v. Brewer*, 11 Pick. 316. The holder of a negotiable note, whether by delivery or indorsement, is entitled to recover under the money counts. *Olcott v. Rathbone*, 5 Wend.

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Rep. 490. *Ainslie v. Wilson*, 7 Cowen Rep. 662. *Butler v. Wright*, 20 John. Rep. 367. A greater array of authorities might be brought to bear upon this point, but it is not deemed necessary. The above would not have been cited had not the late decisions in England established a different rule. We will now advert to some of those decisions.

In the case of *Waynam v. Bend*, 1 Campb. Rep. 175, Lord Ellenborough held, that a promissory note is evidence under the money counts only, as between the original parties to it. And the same rule has been followed by Lord Chief Justice Tenderden, in the case of *Bentley and another v. Northhouse*, 1 Moody and Malkin, 66. *Enon v. Russell*, 4 Maule and Selw. Rep. 507. *Thompson v. Morgan*, 3 Campb. Rep. 101.

In the case of *Eales v. Dicker*, 1 Moody and Malkin Rep. 324, in an action by the indorsee against the acceptor of a bill of exchange, Mr. Justice Littledale said—I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder. And Mr. Chitty says, in his *Treatise on Bills*, (edt. 1839) 595, it seems now to be settled, that the plaintiff can in no case recover under the count for money had and received, unless money has actually been received by the party sued, and for the use of the plaintiff. And he cites *Barlow v. Bishop*, 1 East. Rep. 434, 435, and *Waynam v. Bend*, 1 Campb. 175.

The cases cited above, from 1 Campb. and 1 Moody and Malkin, on which great reliance is placed, are both nisi prius cases. They are, undoubtedly, entitled to great respect, as having been decided by very learned and distinguished Lord Chief Justices of the King's Bench. But those decisions are not, as has been shown, conformably to previous decisions given by judges equally distinguished for their learning and ability. And, unless we labor under some misconception,

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these later decisions are not altogether consistent with some cases since decided in England.

In the case of *Pownal et al. v. Ferrand*, 6 Barn. and Cres. 439, Lord Tenterden, and the other judges, held, that the indorser of a bill, being sued by the holder, and having paid him part of the sum mentioned in the bill, might recover the same from the acceptor, in an action for money paid to his use.

This recovery, it is true, was placed upon the peculiar circumstances of the case. The plaintiff having been forced to pay the money, in the language of the Court, like a stranger, whose property, being on the premises, was distrained by the landlord for rent, is obliged to redeem his property, may recover on the money count. But suppose the plaintiff, on being applied to by the holder of the bill, had paid the full amount, for which, as indorser, he was liable; could he not, on the same principle, have recovered from the acceptor, on the money count? The payment of what he is legally bound to pay, without suit, could not, in any respect, weaken his right. Nor could it have been weakened by paying the whole amount of the bill instead of a part of it.

And would not the indorser, in this view, stand in the same relation to the acceptor, as the holder of whom he received the bill. It was equally the duty of the acceptor to pay the bill to the holder as the assignee of it, as to the indorser who has taken it up. This change, in the holder of the bill, could have no effect on the obligation of the acceptor. He was bound, and equally bound, to both parties. The assignee in purchasing the bill paid for it a valuable consideration, and the indorser in taking it up did the same thing.

The indorser then, having taken up the bill is the holder, having the same rights and remedies as when the bill was first assigned to him. Now, on what ground may he recover the amount of the bill from the acceptor? Whether as indorser or

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assignee of the bill he has paid for it the sum which the acceptor is bound to pay. And bound to pay it to him as the holder of the bill. Is not the consideration paid for the bill money paid on account of the acceptor, and for his use? And is not the bill evidence of this?

In the above case Lord Tenterden remarks—"the law is, that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse me." And the case of *Enall v. Partridge*, 8 Term Rep. 308, is referred to as sustaining this principle. The plaintiff, in that case, put his goods on the premises, knowing that he thereby placed himself in a situation to have his goods distrained for the rent; they were distrained, and, to redeem them, he had to pay the money sued for, and which the Court held he might recover on the general money count.

A surety places himself in a situation in which he is compelled to pay the debt of his principal, and the sum thus paid he may recover from his principal on the general count. Now, in principle, does this case differ from the one in Term Reports? By placing his property on the premises it became subject to the demand of the landlord for rent, and the plaintiff thereby became the surety of the tenants. It was, in effect, the same as giving the property in pledge for the payment of the rent. Having paid the money to redeem his property, he might well recover the amount from the defendants, as money paid to their use.

Every indorser of a bill is a surety for the drawer or the acceptor, and may be compelled to pay it. Pownal et al., in the above case, became the sureties of Ferrand, the acceptor,

and, having paid a part of the bill, it was properly considered as so much money paid for the use of the acceptor.

The right of the plaintiff, then, to recover, depends not upon the peculiar circumstances of the case, but upon the fact, that being legally bound to pay, he has paid a sum of money which the defendant owed, and which he was bound to pay. And this principle applies to all cases of suretyship, where money has been paid by the surety, whether the plaintiff was bound as indorser or otherwise.

The right of the owner of the property distrained, to recover, rested not alone upon the fact of his having paid the rent for the defendants, but upon that fact, coupled with the fact of the obligation he was under to pay it, to redeem his property. And this obligation arose from his voluntary act in placing his property on the premises. The right, then, of the plaintiffs to recover, in the cases of *Enall v. Partridge*, and *Pownal et al. v. Ferrand*, rested upon a general principle. And this principle was directly in conflict with the decisions referred to, that a bill of exchange is not admissible in evidence, under the money counts, in behalf of the holder against the acceptor. And this upon the ground that there is no privity between the parties.

In the case of *Pownal et al. v. Ferrand*, Mr. Justice Little-dale seems to have felt the pressure of this view, for he says that for some time he entertained considerable doubt whether the plaintiff, as indorser, in that form, could recover. Mr. Justice Holroyd took the broad, and, as we believe, the correct ground. The defendant, "he says, as acceptor of the bill, was liable in the first instance to pay it. If he had performed his duty, the plaintiff would not have been called upon by the holder; but, as an indorser, he was liable to be called upon to pay the whole or part; he was called upon, and was

actually compelled to pay part." "It is said the plaintiff, by making this payment, was only remitted to his remedy upon the bill; but I am of opinion that the plaintiff is entitled to recover in this action, upon the same principle upon which a surety is entitled to recover money from his principal. I think that a party is not bound to resort to the original engagement, unless it be by deed, but that he may, at his election, found his action upon the original engagement, or bring indebitatus assumpsit for money paid." Except through the original engagement, where is the privity? A voluntary payment would not maintain the action. And if the privity is derived through the original engagement, it extends equally to the indorsee who has paid for the bill and become the holder, as to the indorser who has taken it up and become the holder. Each has paid the same sum for the bill. And as it regards the right to maintain the action for money paid, the bill being due, it can not be material whether it was purchased or taken up by the holder, before or after it became payable.

Lord Tenterden having decided the action could not be maintained on the general counts, except as between the immediate parties to the bill, seems driven, of necessity, in the case of *Pownal et al. v. Ferrand*, to make a distinction between it and an ordinary case where the holder of the bill sues the acceptor. But the distinction he draws, is one of circumstances, and not of principle.

In the case of *Wilson and another v. Coupland and another*, 5 Barn. and Ald. Rep. 228, these facts were proved: The defendants being indebted to Taillasson & Co., in the sum of £768, upon the balance of accounts, of money had and received; and Taillasson & Co. being indebted to the plaintiffs in a much larger amount, transferred this demand to the plaintiffs, and which the defendants agreed to pay them. On this state of facts the Court held, Abbott Chief Justice, afterwards Lord

Tenterden, that the plaintiffs could recover the amount under the general count for money had and received.

Now, here no money passed between the parties. The debt was due to Taillasson & Co., and the defendants agreed to pay it to the plaintiffs. There was no privity except through the promise of the defendants. And does not the acceptor of a bill promise every holder to pay it at maturity?

In the language of the Supreme Court, in the case of *Raborg v. Peyton*, 2 Wheat. Rep. 385, we think, "it is very difficult to perceive how it can be correctly affirmed that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist, if there be an express contract, although the consideration of the contract originated aliunde. Besides, if one person deliver money to another for the use of a third person, it has been settled that such a privity exists, that the latter may maintain an action of debt against the bailee. And it is clear that an acceptance is evidence of money had and received by the acceptor for the use of the holder. It is the evidence of money paid by the holder to the use of the acceptor. A privity of contract, and a duty to pay, would seem, in such case, to be completely established; and wherever the common law raises a duty, debt lies."

If the contract thus establish the privity and a duty as between the holder of the bill and the acceptor, the same privity and duty must exist between the holder and any prior indorser of the bill whether immediate or remote. We, therefore, think that, under the money counts, this bill is admissible in evidence.

The defendants then offered the maker of the note to prove that after its execution it had been altered in a material part

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without his consent or knowledge. To his competency, as a witness, the plaintiffs' counsel objected.

The general rule is, says Chitt. on Bills, (edt. 1839) 653, that it is no objection to the competency of a witness, that he is, also, a party to the same bill or note, unless he be directly interested in the event of the suit, and be called in support of such interest, or, unless the verdict, to obtain which his testimony is offered, would be admissible evidence in his favor in another suit. *Bent v. Baker*, 3 Term Rep. 27. *Jordaine v. Lashbrook*, 7 Term Rep. 601. *Smith v. Prayer*, Ib. 62. *Jones v. Brooks*, 4 Taun. Rep. 464.

So far as regards the amount of the note the witness seems to have no preponderance of interest for the one party over the other, to this action. But this does not hold in respect to the costs of this suit. Should the plaintiff fail in this action the witness would not be liable to him for the costs; but should he succeed he is liable to the defendants for the costs. On this ground, therefore, he is incompetent. But a release from the defendants being presented, this objection to the witness is removed.

In the case of *Walton and others v. Shelly*, 1 Term Rep. 300, the Court, after a full and most able and elaborate consideration of the question, held, that a person is not a competent witness to impeach a security which he has given, though he is not interested in the event of the suit. But this decision was afterwards overruled in the case of *Jordaine v. Lashbrook*, above cited, and is not considered as law by the English courts. It has been adopted, however, by the Supreme Court. In the case of *The Bank of the United States v. Dunn*, 6 Peters' Rep. 55, the Court held that no person, who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it. And the same rule was sanctioned in the case of *The Metropolis Bank v. Jones*, 8 Peters' Rep. 14. In

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many of the State courts this rule has been sanctioned. *Haughton v. Page*, 1 New H. Rep. 60. *Churchill v. Sater*, 4 Mass. Rep. 156. *Warren v. Merry*, 3 Mass. Rep. 27. *Jones v. Coolidge*, 7 Mass. Rep. 199. *Winter v. Saidler*, 3 John. Cas. 185. *Wilkie v. Roosevelt*, 3 John. Cases, 206. *Coleman v. Wire*, 2 John. Rep. 165. *Skilding v. Warren*, 15 John. Rep. 270. Some doubt as to the rule was suggested by the judges in the case of *Powell v. Waters*, 8 Cowen's Rep. 669, but no decision was given. *Still v. Lynch*, 2 Dall. Rep. 194. *Allen v. Halkins*, 1 Day's Rep. 17. *Bearing v. Reeder*, 1 Hen. and Munf. 175. 2 Binn. 154. 2 Dess. Ch. Rep. 224. *Bank of Montgomery v. Walker*, 9 Serg. and Rawle, 236.

The purpose for which the witness is called is not to show that the note was void in its creation, but that its validity has been destroyed by a subsequent alteration. An alteration after it had been signed by the witness.

In the case of *Baker and Rawlson v. R. and H. Arnold* 1 Caine's Rep. 257, the Court held that an indorser of a note was a competent witness to prove the indorsement was made after the note was due.

Judges Thompson and Livingstone held the indorser was not a competent witness, under their decision, in the case of *Winter v. Saidler*, 1 Caine's Rep. 267, which adopted the rule of *Walton and others v. Shelley*. But Judge Kent, and two other judges, held otherwise. In his opinion, Judge Kent said—I do not think the decisions of this court go so far as to warrant a rejection of the indorser in the present instance. In those cases the maker of the note in the one, and the indorser in the other, were offered to prove the note to have been usurious. Those witnesses were, therefore, called to invalidate the paper they had signed. So in the case of *Walton v. Shelley*, the indorser, who was rejected, was called to prove

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the note void by reason of usury. And he further remarked, that he could wish to see the rule of witnesses being incompetent, on grounds of policy, rendered manageable by being reduced to limits susceptible of definition and certainty. To do this, he says—we must adhere strictly to the cases which produced the rule, and exclude only the witness who was called to impeach his own paper, by showing it to have been immoral, or illegal, when he put his name to it.

The same rule is sanctioned in the following cases: *Warren v. Merry*, 3 Mass. Rep. 37. *Barker v. Prentiss*, 6 Mass. Rep. 430. *Webb v. Danforth*, 1 Day's Rep. 301. *Hubby v. Brown*, 16 John. Rep. 70. *Myers v. Palmer*, 18 John. Rep. 167.

The indorser is not a competent witness, in a suit against the maker of a promissory note, to prove that the note was originally drawn for the indorser's accommodation, and thereby enable the maker to set up a discharge by the holders' giving time to the indorser. For, though a party to negotiable paper may be received to prove subsequent facts to discharge it, yet he is not competent to show that the instrument was not, in truth, what it purported on its face to be. *Bank of Montgomery v. Walker*, 9 Serg. and Rawle, 236.

A party to a negotiable instrument may testify to facts which do not prove it to have been originally void. *Wendall v. George*, 1 R. M. Charl. 51.

The plaintiff declared as an indorsee of a promissory note, drawn by Foster Charlton, payable to the defendant, Lord Mansfield admitted the drawer to prove that the date had been altered. 2 Esp. Rep. 708. And in the case of *Dickinson v. Prentice*, 4 Esp. Rep. 32, Lord Kenyon admitted the drawer to prove, in an action by the holder against the acceptor, that the acceptance was a forgery. His Lordship said the

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objection went to the credit of the witness, and not his competency.

In an action on a note by the payee against the surety, the principal is a competent witness; and his testimony is admissible to prove facts happening after its execution, to discharge the surety. *Freeman's Bank v. Rollins*, 1 Shepley, 202.

The payee of a note, in a suit between the assignee and the maker, is a competent witness to prove upon what terms the assignment was made, if called by the maker; their interests being adverse. *Stone v. Vance*, 6 Ham. 248. The payee of a note, who has indorsed it with a saving of his own liability, is a competent witness to prove an alteration in the note since its execution. *Parker v. Hanson*, 7 Mass. Rep. 470. An indorser is a good witness in an action by an indorsee against the maker to prove that the note was, after the indorsement, fraudulently put into circulation. *Woodhull v. Holmes*, 10 John. Rep. 231.

Where a note, before it became due, was paid to the payee by the maker, who took a receipt in full, and the note was afterwards, before it became due, indorsed by the payee and by the indorsee to the plaintiff, who was informed of the payment before receiving the note, it was held that the plaintiff took it subject to such payment, and that the first indorsee was a competent witness to prove the payment of the note. *White v. Kibbing*, 11 John. Rep. 128.

In the case of *Shelding v. Warren*, 15 John. Rep. 270, it was held that one of the makers of a note was competent to prove that the plaintiffs who sued the indorser were not bona fide holders, and thereby defeated their action. Such subsequent fact, however, must not involve the turpitude of the witness. *Hubby v. Brown*, 16 John. Rep. 70. Under this rule it has been held that a second indorser is competent to prove that the third indorser had said that he had received and

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discounted the note on usurious interest. *Powell v. Waters*, 17 John. Rep. 176.

The great and governing principle in the case of *Walton v. Shelley*, and the other cases cited, is, that an individual, whose name appears upon a negotiable instrument, is not a competent witness to prove that it was not a bona fide instrument, at the time it was made. That he shall not be permitted to prove any fact which conduces to show that the bill or note was not what it purported to be when it received his signature. And this rule is founded upon public policy. It is deemed as incorrect in morals as in policy, that a person whose signature gives credit to a negotiable instrument should not only practice a fraud upon every holder of it, but be a witness to prove the fraud. That he should, by an exhibition of his own turpitude, destroy the value of the instrument in the hands of an innocent holder.

But this rule is limited to the transaction in which the witness was a party. He may prove facts which subsequently transpired, though they should conduce to defeat the action of the plaintiff. But these must be facts in which he had no agency; and in reference to which, as regards the trial on hand, he can have no direct interest. Under this view the witness now offered, showing a release from the defendants, may be examined as to the alteration of the note after it was executed by him and passed out of his possession. The verdict in this case can not be given in evidence in any case either for or against the witness. He is responsible to the plaintiff as the maker of the note, whatever may be the result of this trial.

That the maker of the note, as between the holder and the indorsers, is a competent witness, the defendants having released him from costs, all the authorities establish. And the only question is—what facts may he prove? These must be subsequent to his agency in the making and negotiation of the

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instrument, and it is not perceived that any other limit can be imposed.

The witness was examined, and other witnesses, but the jury not being able to agree upon their verdict, they were discharged, and the cause was continued.

THE UNITED STATES vs. LUCIUS LYON ET AL.

The act of 3d March, 1797, which provides that judgment shall be given at the return term against debtors of the United States, on motion, is limited to cases in which the principal debtor is a party to the action.

The *District Attorney* appeared for the plaintiff, and Mr. *Frazer* for the defendants.

OPINION OF THE COURT.

THIS action is brought on an official bond, signed by the defendants as the surety of Receiver of public moneys. The Receiver is deceased, and, being a defaulter, his account was regularly certified from the proper department of the government, together with a certified copy of his bond; and the writ being returnable to the last term of this court, a motion was made for judgment, under the act of Congress. The motion was continued to the present term, and it is now renewed.

The continuance of the motion can not change the principles on which it must be decided. It must now stand as it stood when first made at the return term of the writ; and the question for consideration is, whether the plaintiff is entitled to judgment. It is insisted that the act of Congress, of the 3d of

March, 1797, provides for judgment, on motion, unless the defendant shall, in open court, make oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, specifying each particular claim, so rejected, in the affidavit; and that he can not then come safely to trial.

These are the words of the statute, and, if they apply to the case under consideration, the judgment must be entered, as no affidavit has been made by either of the defendants.

The principal in the bond, being dead, is not a party to the suit, and it is contended that the above provision can apply only to the principal. To this it is answered, that there is no exemption as to securities in the statute, and, consequently, the provision must apply to them equally as to their principal. And that duty bonds, on which judgments are uniformly entered at the first term, come under the same provision.

This question has not been raised in this circuit, and, from the limited examination which has been made, it does not appear to have been decided in any of the circuits.

The first section of the act provides, that when any revenue officer, or other person, accountable for public money, shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States, &c., the comptroller shall institute suit, &c. This evidently refers to the principal debtor. It embraces a revenue officer, or other person, who owes to the United States a balance on the "adjustment of his account." The words of the fourth section are—"where suit shall be instituted against any person indebted to the United States, the court, where the same shall be pending, shall grant judgment at the return term, on motion, unless the defendant shall," &c. Now, this provision would seem, also, to apply to the debtor of the United States, as described in the

first section. A debtor whose account has been adjusted; and additional force is given to this view, when the conditions are considered on which a continuance may be granted.

The defendant is required to make an affidavit that he is equitably entitled to credits, which, before the commencement of the suit, had been presented and rejected at the treasury; and he is required to "specify each particular claim so rejected." Now, how can any one, except the principal debtor, make this oath? He is, very properly, supposed to be acquainted with his accounts including the rejected items. And he may well be required to specify these items, and to say that they were presented to the treasury. But a security is not supposed to be, and, in fact is not, acquainted with the accounts of his principal, or with their adjustment by the accounting officers of the treasury.

No case could better illustrate the propriety and force of this view than the one under consideration. The Receiver is dead, and suit is brought on his bond against his sureties, on a balance stated to be due on the adjustment of his account. The balance is large, and is the result of a large account, consisting of debits and credits. The first notice to the sureties, perhaps, of the defalcation, is the service of the process some fifteen or twenty days before the commencement of the court. They are necessarily strangers to the accounts, much less are they acquainted with the mode of their adjustment.

How then can they swear that they have credits which ought to be allowed? Credits which have been presented to the treasury and rejected. And how can they specify these credits particularly? It is impossible in the nature of things. And this is enough to show that Congress could not have intended to require impossibilities, or to make the courts of the United States the instruments of injustice. If it were necessary I would say that Congress have not the power, by an act

of legislation, to take away the exercise of that discretion by a court, which is essential to the attainment of justice. They have not power to say how a court shall decide a case, nor that they shall decide it without evidence. The practice of the court may, undoubtedly, be regulated by Congress. But in the administration of justice contingencies may occur which could not have been foreseen, and for which the law has made no provision, and which call for the exercise of the judicial discretion of the court.

As regards the present question the plain import of the language of the act, in the different sections, limits the provision to the principal debtor. Where he is a party to the suit, with the sureties, the affidavit required must be made before a continuance is granted. For, in such case, if there be any rejected credits he must know them, and can state them on oath. And this protects his innocent securities.

It is presumable that the practice referred to of entering judgment at the return term on duty or other bonds, must be cases where the principal debtor is a party to the suit. Any other construction subjects the sureties to the grossest injustice.

Although in this case a continuance was had, at the instance of the Court, the Court overrule the motion for judgment. The defendants, under the rules of the Court, have a right to plead, and until they shall have been ruled to file a plea a judgment will not be entered against them.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—NOVEMBER TERM, 1840.

JUDGE McLEAN does not attend the Fall Term in this State.

DENNISTON vs. McKEEN.

After the lapse of twenty years a presumption of payment of a bond or note arises, and, under peculiar circumstances, it may arise on a shorter time.

This presumption may be rebutted by circumstances.

A new trial will not be granted against strong circumstances of equity.

Mr. *Cooper* appeared for the plaintiff, and Mr. *Lockwood* for the defendant.

OPINION OF JUDGE HOLMAN.

Declaration by assignee on a note executed by defendant, and two others, as partners, in the State of Ohio, in the year 1817, and assigned without recouse.

The defendant pleaded payment.

Defendant rested his case before the jury on the presumption of payment arising from the length of time since the note was executed. To rebut this presumption the plaintiff proved that the defendant had been for a long time living in this State in embarrassed circumstances, and that a suit was instituted against him on this note in the Circuit Court of Cass county, in 1836, which was afterwards dismissed.

It appeared, also, in proof, that one of the partners had died many years ago. That the other, the principal in the firm, was still living in the State of Ohio, and had resided at the place, where the firm transacted their business, ever since the note was executed; and that defendant must have been very young, if, indeed, he was of age at the date of the note.

The Court instructed the jury that, after a lapse of twenty years, a note was presumed to be paid if no demand of payment had been previously made. And even a shorter period would raise a presumption of payment, under peculiar circumstances, but that there were, also, circumstances which would rebut this presumption, and excuse the making of a demand, or the institution of a suit, as when the defendant was insolvent, or his place of residence unknown. That they should consider all the circumstances of this case, and give their verdict accordingly.

The jury found for the defendant.

Motion for a new trial.

Per Court:—The circumstances in this case warrant the finding of the jury. If the lapse of time is considered as limited to the time when the suit, in the Cass Circuit Court, was instituted, it then amounted to nineteen years. And as the defendant's residence in this State had long been known, and although he was embarrassed in his circumstances, there is no proof that he was insolvent. And as there was no evidence whatever of the insolvency of the firm, or that any application had ever been made to the principal of the firm, who still resided where the business had been originally transacted, and who would be presumed to know more about it than a partner so young as the defendant must have been at that time, and as the note had been received by the assignee not in the regular business way, but apparently as a matter of specula-

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tion, the presumption of payment, prior to 1836, was sufficiently strong to authorize a verdict for the defendant.

New trial refused.

WALKER vs. JOHNSON, ADMINISTRATOR OF KENNARD.

OPINION OF JUDGE HOLMAN.

Amended declaration, filed in vacation, more than twenty days before the first day of the term, and notice given to defendant's counsel, but no rule taken on the rule docket, and when defendant's counsel, a few days before the commencement of the term, called at the clerk's office to examine the declaration, it was not in the office, having been taken out by the plaintiff's counsel; it was returned to the office before the first day of the term, of which, however, the defendant's counsel had no notice.

Plaintiff's counsel moved a rule to plead, to operate instant, or during the term.

Defendant's counsel resisted the motion, on the ground that the amended declaration was long and complicated, and presented a new cause of action, and that he had had no opportunity of examining it before the term.

Per Court—Inasmuch as the declaration had been taken from the office by the plaintiff's counsel when the defendant's counsel applied for it, it must be considered as filed the first day of the term, so far as relates to the defendant's counsel having an opportunity to examine its contents; and as the case is of a peculiar nature, arising out of legislative enact-

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ments, which have never had a judicial construction, and the amendment presents, at least, a new state of the case, the defendant is not bound to plead during the present term.

Rule denied, and the cause continued.

Fletcher and *Butler* for plaintiff.

Morrison for defendant.

THE UNITED STATES vs. WM. MARTIN.

An indictment, which charges the defendant with unlawfully abstracting a letter, containing bank notes, from the mail, is good, if it alleges that the letter, containing bank notes, was put into the postoffice to be conveyed by post, and was being conveyed by post, and came into the possession of defendant, as a driver of the mailstage.

Circumstantial evidence sufficient to convict. It should, however, be received with caution.

A new trial will not be granted, unless in the view of the Court, injustice has been done.

Mr. *Pettit* the District Attorney appeared for the plaintiffs, and Messrs. *Howard* and *Judah* for the defendant.

OPINION OF THE COURT, BY JUDGE HOLMAN.

INDICTMENT for abstracting a letter from the mail, containing bank notes.

Motion to quash the indictment, because it does not allege that the letter was mailed, or regularly put into the United States mail.

Per Court.—The indictment alleges that the letter, containing bank notes, was put into the postoffice to be conveyed by post, and was being conveyed by post, and came into the custody and possession of the defendant, as driver of the mailstage.

This allegation is sufficient. The act of Congress states that, "if any person employed in any department of the postoffice

establishment, shall secrete, embezzle or destroy any letter, mail, or bag of letters, with which he shall be intrusted, or which shall have come to his possession, and are intended to be conveyed by post, containing any bank note," &c.

From this language it appears evident that it was the intention of Congress to provide for every possible way in which a letter, intended to be conveyed by post, could come into the possession of any person employed in the postoffice establishment. And, therefore, if this letter had come into the hands of the driver of the mailstage, without having been regularly mailed, it was his duty to have conveyed it safely; and he was liable to the penalties of the law if he embezzled it. If the postmaster neglected his duty, in putting the letter into the mailbags, and it came accidentally into the possession of the mailcarrier, and he embezzled it, the case is within the terms of the statute. The indictment is sufficient. Motion overruled.

The defendant was arraigned, and pleaded not guilty, and a jury impannelled and sworn. A number of witnesses were sworn, and gave evidence to the jury.

Geo. W. Stewart, on the 5th of May, 1840, wrote a letter to Isaac Stewart, New Albany, in which he inclosed two \$100 bills, on the State Bank of Illinois, and put it into the postoffice box in Carlisle, in this State.

Robert Aiken testifies to the same facts, being with G. W. Stewart when the bills were inclosed, and the letter put in the box.

Isaac Beecher, postmaster at Carlisle, states that on the said day, about 9 o'clock, he mailed a packet of letters for the distributing office at Vincennes, in which was a letter directed to Isaac Stewart, New Albany, and sent the packet by the mailstage. The defendant was the regular stage driver. When there were extra mails, another driver was sometimes on the route; but there was no extra mail on that day. Vincennes

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was twenty two miles distant, and the mail reached that place the same day. There was one postoffice between, and another driver on the other part of the line.

Mr. Scott, postmaster at Vincennes, states that no packet, nor letters, were received from Carlisle that day.

Isaac Stewart testifies that he never received the letter, nor the bank bills.

Robert Curry states that defendant was driving on this route in the early part of May; that, on the 8th of May, he was sent by the mail contractor to take defendant's place in driving. As he drove the stage towards Carlisle, defendant went with him. He asked defendant why he gave up the business of driving; and the defendant replied, that he had money enough to do without, and that one was a fool to drive for \$15 a month, when he had money enough to do better elsewhere; and, pulling out his pocket book, showed the witness several bank notes, among which, were two for \$100 each; but the witness did not know on what bank they were. Defendant further said, he was going to Terre Haute, to settle with Benjamin Reeves, a mail contractor, who owed him money.

Benjamin Reeves testified that he never had any business transaction, whatever, with defendant.

Mr. Clark states that, being in company with defendant, on the 7th of May, he saw the defendant with several bills in his hand—one of them was for \$100—but had no opportunity of seeing the character of the others.

Stephen Hale, sheriff of Washington county, on the 13th of June, 1840, arrested the defendant, in Salem, on a charge of embezzling this letter. Defendant requested leave to go to a privy, which witness permitted; but witness followed him, and, suddenly opening the door, saw defendant with his pocketbook open, and saw him hastily throw some small bright object into the vault. Took the defendant to the office of a justice of the

peace, and went immediately, in company with Doctor Newland (who testifies to the same facts) and others, and, with a candle, reached the vault, and found a bright key in the place where he had seen defendant throw the small object from his pocketbook. Defendant was agitated when he was arrested, but was much more so when Doctor Newland brought in the key, and held it up before him, without saying a word. (This key was found, on trial, to open the mailbags in several post-offices, and several postmasters testified that it was similar to the keys used to open all the waymails.)

Mr. Zuel, postmaster on the route from Louisville to Columbus, states that, in July, 1839, the key of his office was lost, and another was sent for from the postmaster at Louisville; that defendant was then driving the mailstage to his office, and knew when the key was sent for; and, once or twice after this, the defendant brought the mail bags to his office unlocked. He inquired of the defendant the reason. The defendant replied, that he had requested the postmaster, at the office next below, to leave them open, as he (Zuel) had lost his key. He never received the key from Louisville.

The Court, after summing up the evidence, instructed the jury that they were to determine, on the guilt or innocence of the defendant, from the testimony they had thus heard in the trial; that, before they could find him guilty, they must be satisfied, beyond a reasonable doubt that, on the 5th of May, the defendant was the driver of the mailstage between Carlisle and Vincennes; that the letter containing the bank notes, as charged in the indictment, came into his possession as mailcarrier, and that he secreted, embezzled or destroyed that letter. Any, or all of these allegations, may be proved by circumstances. Circumstances may be sufficiently strong to justify a conviction for any crime; but all circumstantial evidence is to be received with caution. And circumstances, in order to produce convic-

tion, must be established; they must be consistent with each other, and with the guilt of the defendant; and they must, to a moral certainty, exclude the idea of his innocence.

The circumstance, that the letter failed to reach its destination, is not sufficient, of itself, to prove that the defendant embezzled it. The circumstance of his having large bank bills, without accounting for how he came by them, is not, by itself, any evidence that he took them from the mail. Nor is the circumstance of his having a mail key, evidence that he ever used it unlawfully. Every circumstance is to be fairly considered, as it bears upon the whole case and conduct, as to prove the allegations in the indictment. That they were to fairly weigh every circumstance, for and against the defendant, and if there was a firm conviction in their minds that he was guilty, as charged in the indictment, it was their duty to say so in their verdict; but if not, they were to find him not guilty.

The jury, after having retired until next day, brought in a verdict of guilty. A motion was made for a new trial, and fully argued.

Per Court.—In the argument of this motion it has been suggested, as a reason why a new trial should be granted, that the presiding Judge of the Court is absent. Before the commencement of the trial, the absence of the presiding Judge was mentioned, and the defendant and his counsel were expressly informed by the Court, that if they desired a continuance of the case on that account, it would be granted; but it was their wish to have the trial at this term. The absence of the presiding Judge can not, therefore, form the remotest ground for a new trial.

It is also urged, in argument, that the jury left their box, to retire to their room, under improper impressions.

It is not pretended that the Court instructed the jury improperly, as all the instructions, required by the defendant's

counsel, were given in the express terms required; nor were any instructions given to which they excepted.

There was no contradictory testimony in the case—no litigated questions of law relative to evidence warmly argued in the hearing of the jury, and but very slight attempts to go beyond the evidence, in the argument to the jury. And, in summing up the evidence, and in the instructions of the Court, no undue weight was given to any fact or circumstance that operated against the defendant; nor was any circumstance, however slight, that operated in his favor, omitted; nor is any objection to the substance or manner of the instructions suggested; the Court, therefore, think there is not the slightest ground to suppose that the jury retired under erroneous impressions.

The principal ground for a new trial alone remains—that the verdict is contrary to evidence.

In reviewing the verdict of a jury regularly given, the verdict must be presumed to be right until the contrary appears; and it should be sustained by the Court, if the evidence, by any fair construction, will warrant such a finding. A court is not authorized to set aside a verdict simply because, if they had been on the jury, they would have found a different verdict. It is not sufficient that the verdict may possibly be wrong, but that, after giving a proper weight to all the evidence, it can not be right.

This verdict was given on what is called circumstantial evidence, and the Court feel disposed to give due weight to the arguments, which have been drawn from reported cases, where innocent individuals have been convicted and punished for supposed crimes, which were never committed, or committed by others. These arguments show the necessity of extreme caution in convicting on circumstantial evidence, but do not prove that circumstances may not be sufficiently strong to authorize

a conviction, or, that circumstances are not to be relied on in proof of guilt. If a train of circumstances, are not deemed sufficient to produce conviction, the penal laws in relation to many offences, especially most of those against the postoffice regulations, would be a dead letter.

In this case, the Court think the circumstances, which were proved, strongly conduced to establish every fact that the jury were required to find, in order to make up their verdict of guilty. The circumstances themselves were established as fully as the nature of the transactions would admit of. As, for instance, without recapitulating the testimony, it was expressly proved that a letter, directed to Isaac Stewart, New Albany, was put into the postoffice box, at Carlisle, on the day named in the indictment, and that the postmaster at Carlisle, on that day, mailed all the letters that were in his office, and going in the direction towards New Albany, in a packet, among which was a letter directed to Isaac Stewart, and that he sent that packet by the mailstage, and that the defendant was the regular driver of the stage. We think this evidence warrants the finding, that this letter came into the possession of the defendant.

Nor do we think there are any of the circumstances which are inconsistent with the idea of the defendant's guilt. The two circumstances which were urged, in argument, as being of this character, are perfectly reconcilable with the supposition, that the defendant was guilty, to wit:—his exhibition of the bank bills a few days after the offence was committed, and his continuing, for more than a month, in less than a hundred miles of the place where the offence was committed, and in a section of country where he was not entirely unknown.

Without adverting to the many cases, in the history of human conduct, where persons, guilty of crimes, have acted seemingly contrary to the dictates of common sense, and in such a

manner as naturally lead to their detection and punishment, we do not think there is any thing inconsistent with the supposition of the defendant's guilt, in the fact that, a few days afterwards, he exhibited the bills which he is supposed to have embezzled.

It can not be accounted as passing strange that a young stage driver, having recently obtained the possession of what must have appeared to him as a large amount of money, though criminally obtained, when in company with a fellow stage driver younger than himself, and speaking of having plenty of money should, in the flush of self-important feeling likely to arise on such an occasion, exhibit the evidence of his wealth, as the defendant did. It may be termed imprudent—a moment's reflection might show its folly; yet it is by no means improbable.

And, if he was in possession of a key that would open any of the waymails, and had been in possession of it for nearly a year, without detection, it is not at all strange that he should continue in a country where he had some acquaintances, and where he might be most likely to be employed in the transportation of the mail, to which, it seems, his attention was directed. A feeling of security might naturally have come over him, and he may have felt it of some consequence to continue in the circle of his former operations, as a stage driver, which, however, was nearly a hundred miles from the place where the crime is said to have been committed. Nor was he stationary there, as he was said to have been in Louisville seeking an engagement, in the transportation of the mail.

Not only are all the circumstances consistent with each other, and with the hypothesis of the defendant's guilt, but, when all taken together, they, to say the least, strongly conduce to exclude the idea of his innocence.

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Believing, therefore, that the evidence in the case warranted the finding of the jury, the motion for a new trial is overruled.

At a subsequent day of the term, the prisoner was brought before the Court, and, having nothing further to alledge why sentence should not be passed upon him, was addressed by the Court as follows:

You have been indicted for the violation of an important trust; and, after a fair trial, in which you have had the aid of able and experienced counsel, you have been found guilty by a jury of your country. And, by a motion for a new trial, zealously and impressively made in your behalf, the Court has been required to review the grounds on which this verdict has been given; and, after a careful examination of the facts and circumstances testified against you, are bound to approve of the verdict, and to hold you as guilty, and to pronounce the sentence of the law upon you.

It is with no ordinary feelings they discharge this duty. In every view of your case it is painful. To see a young man, under no peculiar disadvantages, just entering into the ranks of men, in a country like ours, where an honest livelihood is every where presented—to see him commence his course in life by the commission of an aggravated crime, and, in one guilty moment, to blast all his future prospects, and incur the penalty of the violated law, whose lightest punishment is ten years' imprisonment in the penitentiary: It is indeed painful.

By this fatal deed you have destroyed yourself; you have forfeited your liberty for a long series of years; you have clothed yourself with disgrace, and prostrated all your cherished expectations in life.

But, although you have brought yourself into this lamentable condition, your case is not yet desperate. The prospect before you is truly dark and dreary; yet there is a distant ray of hope

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that may enlighten your path. You are very young, and may have a long life before you. You may do much by a patient submission to the law—by a reformation of life, and an upright line of conduct to enlist the sympathies of your fellow citizens; to reach the clemency of the Executive of our Government, and, to some extent, to regain a station among honest men.

You may do more than this: By repentance and reformation, you may obtain the approbation of Him, whose favor is better than life or liberty, and far more valuable than an earthly reputation. Every thing, therefore, calls upon you, in the most impressive terms, to live every day of your life as an honest, upright man.

The Court have fixed your punishment to the shortest period allowed by the law you have violated, and sentence you to a confinement, at hard labor in the penitentiary of this State, for ten years from this time.

THE UNITED STATES vs. SPENCER ET AL.

OPINION OF THE COURT, BY JUDGE HOLMAN.

DECLARATION, ON a receivers' bond, against the principal and his sureties.

Breach assigned: That Spencer was appointed Receiver of public moneys, for the term of four years, commencing on the 1st of January, 1835, and ending the 31st of December, 1839; and that divers large sums of money, arising from the sale of lands, came into, and were in, his possession, during his con-

tinuance in office—to wit: on the first day of January, 1840—which he failed and refused to pay, &c. General demurrer, by the sureties.

The breach is insufficient, as respects the sureties. They are bound for the payment of all sums of money that come into the receiver's hands during his term of office, and no longer; and, as his office expired on the 31st of December, 1839, they are not bound for moneys that came into his hands on the 1st day of January, 1840, the day after his term of office expired. If the day alledged is material, and I am inclined to think it is, it can not be rejected as surplussage, and, therefore, the declaration is insufficient.

Plaintiff had leave to amend, and the cause was continued.

Pettit, District Attorney, for plaintiff.

Cooper, Butler and O. H. Smith, for defendants.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1840.

ROBERT PIATT *vs.* OLIVER, WILLIAMS et al.

Where a complainant files a bill, claiming for himself and others certain tracts of land purchased in partnership, to sustain the suit it is enough to show that the land was purchased by the partnership funds, without specifying the amount contributed by each partner.

A contract made in fraud of the law, which grows out of, or is connected with, an immoral act, will not be enforced.

An agreement not to bid against each other at a sale on execution is against public policy, and consequently invalid.

But on a sale of public lands, it is not unlawful for individuals to associate together to purchase for their joint interest.

Such an association is unobjectionable, where there was no fraud, and especially where a high price was given for the land purchased.

A doubt may well be entertained whether a rule which, in this respect, applies to sales of chattels on execution, can apply to a public sale of lands by the United States. Great numbers attend these sales, general notice of them being required. And such restrictions are imposed as are deemed necessary to protect the public interest. They are made, too, on a national scale.

The reason of the rule, which forbids associations for the purpose of purchasing, &c., does not apply.

In this case there was no agreement not to bid against each other, but that certain tracts should be bought at the sale by the joint company.

That one of the parties, who had acted as agent, should shelter himself from responsibility under such circumstances, instead of promoting, would defeat the great ends of justice.

The transaction was sanctioned by the Government in issuing certificates of purchase, and afterwards by the relief given under a special law.

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No judgment of a State or Territory can affect lands beyond the jurisdiction of such State or Territory.

The jurisdiction of the Territory of Michigan extended south to the northern boundary of Ohio as first run, and until such boundary was altered with the assent of Congress.

This alteration of the line with the assent of Congress, which extended the jurisdiction of Ohio north, cannot affect titles to real estate acquired by judicial proceedings in Michigan, within the Territory over which the jurisdiction was thus changed.

An agency, as against the individual, may be proved by his acts and declarations. The intent with which certain acts are done may be inferred from the facts connected with the circumstances.

When a judgment is used as evidence, its regularity cannot be inquired into.

At common law an equity of redemption is not liable to be sold on execution, nor by attachment.

It is made liable in some States by statute. In the Territory of Michigan, an equity, vested in an agent for certain purposes by the *cestui que trusts*, the fee being in the Government, cannot be levied on and sold by an attachment against the agent.

A purchaser at the sale on the attachment, under such circumstances, can acquire no right.

And an assignment by the trustee to the purchaser, being for no other consideration than the sale by attachment, can convey no interest.

The proceedings on the attachment being invalid, the assignment, as a consequence of those proceedings, must be equally invalid.

And this matter is properly examinable in equity.

And although on the assignment of the certificate of purchase, patents may have been obtained by the assignee, his right may still be inquired into.

The assignee of an equity takes it generally subject to all equities.

This is especially the case, where the assignee had a full knowledge of the interest assigned.

All persons materially interested in the subject matter of the suit must, if within the jurisdiction of the Court, be made parties.

There are some cases where a trustee may sue, without naming the *cestui que trusts*, but the *cestui que trusts* must be named, where the object is to divest them of title.

In general, the *cestui que trusts* must be made parties.

If the demand existed on the trust fund before the trust was created, a suit may be sustained against the trustee only.

Where the parties are so numerous as not to be inserted conveniently in the record, suit may be maintained in the names of a part for the whole.

In a proceeding in equity, to foreclose a mortgage given by the trustee, the *cestui que trusts* are necessary parties.

And a sale of the premises, where the *cestui que trusts* are not made parties, does not bind their interests.

The assignment of the certificates of purchase for the land sold under the mortgage by the trustee, by which the purchaser, as assignee, obtained patents, being made under the mortgage sale, cannot bind those who were not parties to the suit.

After the execution of the mortgage, the trustee had no power to sell.

Platt v. Oliver, Williams, et al.

It is a well established principle in equity, that the act of a trustee shall not prejudice his cestui que trust. If a trustee purchase the estate of his principal, the sale, as a matter of course, is set aside unless ratified.

If a trustee purchase land with the trust fund, and take the conveyance in his own name, in equity the land is held as a resulting trust.

Whatever acts are done by the trustee, are presumed to be done for the benefit of the cestui que trusts, and not for the benefit of the trustee.

Wherever the trust fund is converted into another species of property, if its identity can be traced, it is liable in its new form to the cestui que trust. In such a case the cestui que trust may exercise his option either to take the property or pursue some other remedy.

This doctrine applies to all persons who act in a fiduciary character.

An individual who has an interest in certain real estate, for the management and sale of which a trustee is appointed, must be presumed to know the nature of his title and the acts of the trustee.

He cannot, having purchased the estate from the trustee, set himself up as an innocent purchaser without notice.

The statute of limitations does not run against an established trust.

Nor will lapse of time, except under extraordinary circumstances, operate in a case of trust.

OPINION OF THE COURT.

At December term, 1837, this case was before the Court on pleas in bar, filed by the defendants, Oliver and Williams. These pleas were overruled, and answers being filed, the case now stands on its merits.

In the summer of 1817, the complainant, in connexion with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this State—and the complainant was appointed the agent of the company, to attend the sale for that purpose.

Another association, consisting of Martin Baum, Jesse Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver and Andrew Mack, was formed for the same object—and William Oliver and William C. Schenck were appointed its agents to attend the sale.

Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and

the agents agreed that they would purchase tracts one, two, three and four, at, and including the mouth of Swan creek, in the United States Reserve, at the foot of the rapids of the Miami; and, also, numbers eighty six and eighty seven, on the other side of the river, opposite the mouth of Swan creek, for the joint benefit of both companies; each company to have one-half of the lands purchased; and to pay at the same rate. Numbers eighty six and eighty seven were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

At the same sale, the complainant, in behalf of his company, purchased the northwest quarter of section two, township three, the southwest quarter of the same section, the northwest quarter of section three, township three, and, also, the southeast and southwest quarters of the same section, in said reserve; and one fourth of the purchase money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Platt company, the other the Baum company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with the view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

On the 14th of August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title bonds, to the

purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and, also, the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one fourth of the purchase money was to be paid down, and the residue in three equal annual payments.

At the sale of lots, the sum of eight hundred and fifty five dollars and thirty three cents was received by Schenck, for which he was to be accountable to Baum.

At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them.

In August, 1818, he sold one half of his interest in the Port Lawrence Company to William Steele and William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre.

By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts one and two, having agreed to pay for the same about twenty thousand dollars; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt companies respectively. In pursuance of this object, the five quarter sections purchased by the Piatt company were assigned to Baum, the 17th September, 1821; and, on the same day, tracts numbered one, two, eighty six and eighty seven, purchased in the name of the Piatt company for the Port Lawrence Company; and, also, tracts three and four, purchased by Oliver for the same company, were assigned to Baum. It is alledged that these tracts had been previously assigned to Baum, of which there is no evidence.

On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished, to the United States, tracts one and two. On these tracts there had been paid the sum of four thousand eight hundred seventeen dollars and fifty five cents. Thirteen hundred seventy two dollars and thirty four cents of this sum were applied to complete the payments on tracts three, four, eighty six and eighty seven, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained three thousand four hundred forty five dollars and twenty one cents. Of this sum, one half belonged to the Piatt company. Twelve hundred and forty eight dollars were applied to complete the payment on the five quarter sections, which left a balance of four hundred seventy four dollars and sixty cents still due to the Piatt company; but which was applied in payment of lands held by the Baum company.

After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and, also, damages for their improvements.

On the 10th September, 1822, Baum gave to Oliver a certificate which stated there was due him, by the Port Lawrence Company, the sum of two hundred thirteen dollars and two cents, which he refunded to purchasers of lots, by the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth and William M. Worthington."

And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of eighteen hundred thirty five dollars and forty seven cents; to secure the payment of which, Baum executed to him a mortgage on tracts

three, four, eighty six and eighty seven. The payment was to be made, with interest, on or before the first of January, 1824.

The 7th October, 1825, Oliver caused an attachment to be issued by the Clerk of Monroe county, in the Michigan Territory, against Baum and the members of the Piatt company, on the certificate of indebtedment given by Baum. This attachment was levied on four of the five quarter sections owned by the Piatt company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by the auditors appointed, for the sum of two hundred forty one dollars and sixty cents, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal.

A bill to foreclose the mortgage given to Oliver, was filed by him in the Supreme Court of Michigan, the 13th of October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the Chancery Court, to Oliver, the 1st September, 1828, for six hundred eighteen dollars and fifty six cents.

By the act of 20th May, 1826, the Secretary of the Treasury was authorized to select, for the benefit of the University of the Michigan Territory, a certain number of acres of the public lands within the Territory, and he selected tracts one and two, which had been relinquished.

In the summer of 1828, as appears from the report of the committee of the trustees of the University, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts one and two, on which the town of Port Lawrence had been laid out.

A law of Congress was passed, authorizing the exchange, the 13th January, 1830. Previous to this, Baum assigned to

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Oliver the final certificates for the tracts he purchased under the attachment, and, also, under the decree of foreclosure; and one of the quarter sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the University tracts numbered three and four, except ten acres reserved of number three, and the northwest quarter of section two, town. three, and, also, the northwest and southwest quarters of section three, town. three, he received an assignment from the University of their right to tracts one and two, for which patents were issued in the name of Oliver.

After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one third in tracts one and two, eighty six and eighty seven. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number three. On the 23d May, 1834, he conveyed to him an undivided half of tracts eighty six and eighty seven, except sixty acres which had been sold to Prentice and Fromley; and on the—— day of November, he conveyed to him "one undivided half of lots one and two, on which Port Lawrence was laid out, together 'with a like interest in all sales and improvements thereunto belonging.'"

Oliver, Baum and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts one and two.

Of the Piatt company, John H. Piatt is deceased, and his ad-

ministrators and heirs are made parties to this suit. William M. Worthington assigned one half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

Of the Baum company, Martin Baum, Jesse Hunt, William C. Schenck and William Barr, are deceased.

These are the outlines of the present case. Many of the facts have been omitted in this statement, which will be adverted to in considering the legal questions that are involved.

On the part of the defendant's counsel, it is objected that the complainant has failed to show, either in his bill or by the proof, any interest in the subject matter of controversy, which will enable him to maintain this suit. And as this objection goes to the very ground of the right asserted, it will be first considered.

In his bill, the complainant states, that he, in connection with the other members of the Piatt company, formed an association to purchase public lands. And this allegation is proved by an instrument of writing signed by the parties. And it appears from the bill and the evidence, that the company paid a large sum on the purchases made by them separately, and as connected with the Port Lawrence Company. It does not appear how this money was obtained, whether by an equal contribution of the partners or otherwise; nor is it necessary for the purposes of this suit, that this should appear. It is enough to show that the complainant, and the others named, were partners, and that the money paid was the money of the company; that the lands purchased were for the interest of the company; and all this is sufficiently shown by the pleading and evidence.

The next point which it seems proper, in the order of time, to examine, is, as to the legality of the joint purchase by the two companies at the public sale. On the part of the defendants, it is contended there was an unlawful combination, between these associations, to purchase the public lands at the sale at a reduced price. That, in effect, they agreed not to bid against each other, and by that means, bought the tracts stated at a less price than they would have sold for. And that, under such circumstances, neither a Court of Law nor a Court of Chancery will give any relief.

That the contract was made in fraud of the law and against public policy, and, consequently, can receive no countenance in a court of justice.

This question was raised by the pleas in bar above noticed, but as the pleas were held to be defective on other grounds, it was not then decided.

The first and leading authority on this subject, is in the case of *Boswell v. Christie*, 1 Cowp., 395. The plaintiff sent a horse to an auctioneer to be sold with other goods, which belonged to a deceased person, the whole of which were to be sold to the best bidder; but the auctioneer was directed not to sell the horse under £15—he was bid off for £6 16 6. And the question was, whether the owner may employ another person to bid for him privately. The Court considered this unfair, and that it was a fraud upon the public to throw this horse into the sale of goods represented as being an executor's. The plaintiff was nonsuited. Upon the authority of this case, was, afterwards, decided *Haward v. Castle*, 6 Term Rep., 642. In that case, it was held that where puffers were secretly employed by the seller, the sale was fraudulent, and the bidder to whom the property was struck off, was not obliged to complete the contract.

In the case of *Jones v. Caswell*, 3 John. Ch. cases, 29, it was decided that no recovery could be had upon the note in question, as it had been given to induce the plaintiff not to bid at a sheriff's sale. That it was against public policy.

A contract made in fraud of a law will not be enforced, or where it grows immediately out of, or is connected with, an illegal or immoral act. *Hannay v. Eve*, 3 Cranch Rep., 242. *Armstrong v. Toler*, 11 Wheat. Rep., 258.

In 1 Story's Eq., 290, it is laid down that agreements, whereby parties agree not to bid against each other at a public auction, especially on a sale of chattels, or other property on execution, are held void, as against public policy. And so, if underbidders or puffers are employed at an auction to enhance the price and deceive other bidders, and they are in fact misled, the sale will be void. *Doolin v. Ward*, 6 John. Rep., 194. *Wilbur v. How*, 8 John. Rep., 444. *Bartle v. Adms. of Coleman*, 4 Peter's Rep., 184. *Craig et al. v. The State of Missouri*, Id. 436. An unlimited number of authorities might be cited to show, that a contract made in violation of the law, or against its settled policy, will not be enforced. In 1 Mc'Lean's Rep., 300 and 301, a number of authorities are cited to sustain that position. And also a number which, to some extent, conflict with some of the principles laid down in Cowper and in other authorities.

In the case of *Gonelly v. Parsons*, 3 Ves. 624, it is said to be the common practice for bidders not to bid against each other for particular lots. And as a protection against this, it is said the seller may employ persons to bid for him. *Bromly v. Att.*, Id. 623. The purchaser objected to a specific performance on the ground that the vendor employed a person to bid against him, and the fact was admitted. The property was put up at £900. The defendant bid £10, and the person employed by the plaintiff bid £920, the defendant then bid £950, and it was

knocked down to him. Under these circumstances, Lord Loughborough decreed a specific performance. ●

It would seem not to be reasonable or just in every case, without regard to circumstances, where a seller of property has employed a bidder to protect his interest, to hold the sale void. But however this may be, there can be no doubt that an association of individuals may be formed for the purpose of purchasing property, either at public or private sale. This is nothing more than a limited partnership for a special object, and it is strictly legal. Such associations, it is known, have been formed to purchase the public lands at public auction and otherwise; and no objection is believed to have been made to them by the Government.

At the time the sale in question was made, the law fixed the minimum price at two dollars per acre, for which the land must sell; and this guarded the public interest. After the sale, any of the lands which had been offered and not sold, were liable to be entered at that price. And the whole policy of the Government has regarded a fair and open competition as more important, than to obtain a high price for the land. This is shown by the reductions of the price of the public lands, the liberal manner in which pre-emption rights have been given, and the indulgencies granted to purchasers under the credit system.

In the present case, there was no agreement that one company should not bid against the other, but that certain tracts being desired by both companies, should be purchased for the joint interest of both. Was there any thing immoral in this? Was it in fraud of the law, or against the public policy?

We can best judge of an action by its effect. And what was the effect of this combination which is so much complained of? The two tracts of land in controversy, numbered one and two, containing about four hundred acres, sold for about

twenty thousand dollars; and the other tracts purchased by the joint company, sold higher than other tracts purchased by individuals.

If this transaction then be scrutinized, it will be found to have operated most beneficially to the Government, and injuriously only to the purchasers. They agreed to pay a much greater sum than the land was worth. A sum so extravagant, that, to save the company from ruin under the pressure of the times, they were obliged to relinquish it to the Government. And it is said that the company had determined to forfeit the payment on these tracts of more than four thousand dollars which they had made, rather than pay the balance of the purchase money, before the relief law of 1821 was passed. And yet the counsel for the defendants contend that, by reason of this combination, tracts one and two were sold for less than they would under other circumstances have sold for. Whatever other objection may be urged to this association, there would seem to be no ground for this objection.

In another branch of the argument, the character of Baum is relied on against the imputations made in the bill; and with how much greater force may the same argument be used against the imputations of the answers, by referring to the Port Lawrence Company, which included Baum, the defendant, Oliver, and other gentlemen of high character.

This transaction, in our view, is sustainable on principle and authority. And if in this view doubts could arise, still it would not follow that the defence could be available to the defendants.

We consider the purchase fair to the public, to bidders, and free from objection under the law. It was sanctioned by the Government, and that without objection. But if objection could be made to the purchase, it could avail the defendants nothing. The sale was not only sanctioned by the Govern-

ment, but, under the relief law of 1821, the transaction was again sanctioned, and assumes a new aspect by the application of the money paid on tracts one and two, to complete the payments on other purchases.

Where persons have combined to defraud the public, and one individual happens to get the advantage of another, no Court will grant relief. The agreement being infected with fraud, and each party being alike guilty, no Court will apportion between them the wages of their iniquity.

But the Port Lawrence Company, in their association and purchase, were guilty of no immorality. They violated no public policy or law; they did nothing injurious to the public interests—nothing which had not been ordinarily done, in similar cases, under the sanction of the Government. A rule which would enable a participator in such a transaction, who had obtained a title for the land purchased, to shelter himself from responsibility under the plea of fraud, would itself become an instrument of the grossest injustice. It is due to the justice of the case, to the character of the persons concerned, not excepting the defendant, Oliver, to vindicate the transaction from any just imputation of fraud.

And this defence of fraud at the public sale, as it regards the interests of the other principal defendant, Williams, is equally unsustainable. He was not a party to the purchase at the sale, but subsequently having acquired an interest in the lands purchased, it is insisted that his right is not examinable on account of the original fraud. In other words, that a vendee instead of relying upon his contract of purchase, may hold the property by showing that the vendor had obtained it fraudulently, or against public policy; and this without having the shadow of a right, except that which is derived under the vendor. When such a rule shall be sanctioned by that Court,

whose decision is the law of this Court, it will here be recognized.

Where a person's property is taken by execution and sold against his consent, it is just and proper that his interests should be scrupulously guarded. The property to be sold is generally of small amount, and but few persons attend the sale under the limited notice required to be given. Any combination which shall defeat a fair competition, under such circumstances, would be unlawful; and any contract, on which such combination was formed, would be void. But suppose at such a sale, some two or three individuals being desirous of purchasing the property, associate together for that purpose, and buy the property at its full value, there being an open sale and competition, could the purchase be set aside? And if, in addition to this, the owner of the property subsequently to the sale receives it back again, and gives to the purchasers, other property or money in lieu of it, would the transaction be fraudulent? And could one of the party purchasers, having got possession of the property or money received in exchange, and claiming it as his own, protect himself against his partners, on the ground that the original purchase was fraudulent?

The public sales of lands are made on a liberal and national scale. Notice of a sale is given throughout the United States, and the large amount of the public domain to be sold on such an occasion, not unfrequently attracts particular attention in every part of the Union. Vast numbers of persons attend the sale, and hundreds, if not thousands, become bidders. Such regulations as are deemed necessary to protect the public interests are adopted by Congress, and, under their authority, by the Executive branch of the Government.

It may well be doubted whether a rule which may be salutary and just in a sale on execution, must be equally applicable to a sale of the public lands by the Government. For the pres-

ent purpose it is enough to say, that we see nothing in the original purchase of the lands in question, which can affect its validity.

We will now examine the jurisdiction of the courts of the Michigan Territory, before whom the proceedings in attachment, and the decree of sale of the mortgaged premises, were had.

No judgment or decree of the courts of any State or Territory can operate upon the title to lands in another State or Territory. It is peculiarly the province of the sovereign power to regulate, whether by operation of law or by actual conveyances, the transfer of real estate within its own jurisdiction. And no conveyance or will, executed in a foreign State, can have any effect, except under the laws of the State where the land is situated.

That the lands in controversy in this suit are now within the acknowledged jurisdiction of Ohio, is admitted; but it is contended they were within the jurisdiction of Michigan at the time the proceedings stated took place.

By the law of Congress authorizing the people of Ohio to form a State Government, it is declared, that the State to be formed shall be bounded "on the north by an east and west line drawn to the southerly extreme of Lake Michigan, running east, after intersecting the due north line aforesaid, from the mouth of the Great Miami, until it shall intersect Lake Erie, or the territorial line, and thence with the same through Lake Erie," &c. This boundary was adopted by the convention, and was copied into the constitution of Ohio, with a proviso "that if the southerly bend or extreme of Lake Michigan should extend so far south that a line drawn due east from it should not intersect Lake Erie, or if it should intersect the said lake east of the mouth of the Miami river of the lake, then and in that case, with the assent of the Congress of the United

States, the northern boundary of the State shall be established by, and extended to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay, after intersecting the due north line from the mouth of the Great Miami river as aforesaid; thence northeast to the territorial line, and by the said territorial line to the Pennsylvania line;" and the constitution was sanctioned by Congress with this proviso.

Under a law of 1812, the Surveyor General of the United States caused two lines to be run, one in conformity with the act of Congress, copied into the constitution of Ohio, and the other as called for by the proviso in the constitution. And, in pursuance of a law of 1831, the President of the United States caused to be ascertained, by observation, the latitude and longitude of the most northerly cape of the Miami bay, and also the point at which a direct line drawn east from the southerly extreme of Lake Michigan will intersect the Maumee river and bay. And it was found that the latter line was forty one degrees thirty seven minutes and seven seconds north, and the former forty one degrees forty four minutes and seven seconds north. These observations are supposed to correspond with the lines run by the Surveyor General. Neither the lines nor the observations seem to have been satisfactory to the parties concerned, but they are sufficiently accurate for the question of jurisdiction in this case.

From the proviso in the constitution it appears, that the northern boundary was to run to the most northerly cape of the Maumee bay, and if the line running east should be south of that, with the assent of Congress, it was to be so altered as to run to the cape. But the consent of Congress being a condition precedent to any deviation from an east line, such line being run, constituted the northern boundary of Ohio until changed under the sanction of Congress. The required assent

of Congress was given by the act of the 23d June, 1836, which declared "that the northern boundary of the State of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay."

As the northern boundary of Ohio, whether temporarily or permanently established, constituted, in that part, the southern boundary of Michigan, it follows that the jurisdiction of Michigan was properly exercised north of the line, and that of Ohio south of it. And it would seem that the alteration of the line, with the assent of Congress, which extended the jurisdiction of Ohio further north, should not affect titles acquired in any legal form under the jurisdiction of Michigan.

This is a very different question from one which arises under a disputed location of boundary. In such a case, the settlement of the boundary shows whether the jurisdiction exercised by the litigant parties has been rightfully or wrongfully exercised. But in the present case it is clear, that the jurisdiction of Ohio could not be legally exercised north of the east line, until the assent of Congress to a line that should strike the cape was obtained. No question can arise as to the power of Congress to act in the case, as Ohio, in her own constitution, made their consent a condition precedent and indispensable.

It is admitted that the land in controversy lies north of the east line, and south of the line running to the cape. And this would seem to determine the right of jurisdiction to be in Michigan, until the act of 1836.

We will now examine the nature and extent of the agency of Baum, and also of that of Oliver.

There is no evidence in writing which shows the nature of the trust vested in Baum. It appears from the bill and answers, that tracts one and two were purchased by the Port Lawrence Company, with the view of laying out and building up a town;

and that Baum was appointed a trustee to sell lots in the town, make titles, and superintend the concerns of the company. In his deposition Judge Burnet says his impression is, "that Baum's powers were general and unrestricted. That the company relied on his judgment and correctness in every thing relating to their interest, and expected he would lay out a town and dispose of the lots as he thought best. He says the company did not meet often, nor did they frequently give instructions to Baum. They seemed to rely on his prudence and discretion."

In their instructions to Oliver, to lay out the town, &c., the proprietors of the Port Lawrence Company say "an immediate correspondence is to be opened by the agent with Martin Baum, Esq., of this city, (Cincinnati,) who will act as trustee for the proprietors; and every information will be given to him, in relation to the business of the agency, the progress of the settlement, and the sale of lots, that may be required or deemed essential to the interests of the concern."

The complainant states, in the amended bill, that Baum was appointed trustee, and accepted the trust; and that it was agreed "that the certificates for said tracts should be assigned to him to enable him to execute the trust." He, it seems, had power to appoint an agent, and he did appoint Oliver. Baum acted in this agency, it is insisted, until his death. There is no pretence that it was terminated prior to the assignment by him of the lands of the company. He also acted as agent for the Baum company, in relation to other lands held in their own right.

Oliver's agency was constituted under the hand and seal of Baum. The instrument is dated the 14th August, 1817, and authorized Oliver, "in the name of Baum, to sell and dispose of the lots in a town to be laid out at Swan Creek, on the Miami of the lake, agreeably to a letter of instructions therewith de-

livered, and to receive payment for the same from the purchasers; and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold; and to do all lawful acts requisite for effecting the premises.”

As it regards the plan of the town, the conditions on which lots were to be sold, &c., Oliver received from the proprietors a letter of instructions, bearing the same date as the power of attorney from Baum, and also a letter of instructions from him of the same date, and which is an exact copy of that of the proprietors.

On the same day Baum addressed a letter to Oliver, in which, after referring to his agency, he says, “your appointment is for one year, commencing this day, for which services so rendered you are entitled to receive from the proprietors twelve hundred dollars.” And he further remarks: “And the proprietors of the lands lying in that county, but which is a distinct concern from the above, have agreed to allow you three hundred dollars for attending to their separate business.” And there is among the papers a regular power of attorney, from Baum to Oliver, in regard to this separate interest, of the same date as the above.

In the spring of 1818, Oliver was appointed Cashier of the Miami Exporting Company Bank; and on the first of July ensuing he assumed the duties of that appointment. At this time, he alledges in his answer, he surrendered his agency to Baum, and made with him a final settlement. He admits, however, that being interested with Baum in town lots 223 and 224, on which they built a warehouse and other improvements, and having other lands in the neighborhood, and possessing a better knowledge of the business and interests of the Port Lawrence Company than any one of the parties concerned, he was repeatedly brought in contact with Baum, was consulted by him, and on his occasional visits to the Maumee country, was in-

trusted with business for the company after the close of his agency.

On the part of the complainant, it is contended that his agency continued, and did not terminate on his assuming the duties of Cashier; and in proof of this his acts are relied on.

The power of attorney to Oliver was unlimited as to time, and there is nothing which restricts it to one year, unless it be the letter which fixes his compensation; and the limitation of this letter may be considered perhaps as much, if not more, with reference *to the salary allowed, than to the authority* given him. The duties, however, of Cashier, were wholly incompatible with that general superintending agency which it would seem, from the salary paid, was at first contemplated. He resided a considerable part of the first year of his agency at Port Lawrence, and gave the greater part of his time to the concerns of the company.

He alledges, in his answer, that Peter G. Oliver, in 1818, and for three years thereafter, acted as agent for the company; and being young and inexperienced, the defendant frequently advised him respecting the business. And John E. Hunt, the defendant also alledges, acted as agent for the company. But it seems from the accounts stated by Baum against the Port Lawrence Company, and also by accounts presented by Oliver to Baum for services rendered and moneys paid, that he acted as his agent, at least to some extent, down to the spring of the year 1830. It is true that several of these accounts related chiefly, and some of them exclusively, to the concern of the Baum company, which was entirely distinct from the Port Lawrence Company. The last account rendered contains a charge for surveying two small tracts which related to the Port Lawrence Company. In fact, his claims against the Port Lawrence Company, on which was instituted his legal proceedings, and on which his whole title rests, except the amount paid by

him and his partner, Baum, for lots 223 and 224, and their improvements, were founded on moneys refunded by him to purchasers of town lots and services rendered. This could only have been done in the capacity of agent. It cannot be supposed that as a mere volunteer, without authority, he would make these advances; indeed, this is not pretended by the defendant. He alledges that, having been agent in selling the lots, and instrumental in inducing many to purchase, he felt bound to aid in indemnifying them after the town tracts were relinquished to the Government.

The agency which Oliver exercised, after his duties as Cashier commenced, was of a more limited character than that with which he was at first invested. He was not bound, perhaps, to give any fixed portion of his time to the business of the company; but that he did transact, after the 1st July, 1818, the principal business of the Port Lawrence Company, is shown by his acts and declarations.

On the 19th September, 1818, associated with Wm. M. Worthington, he divided between the proprietors the unsold lots. And in a letter to Sage, dated at Piqua, March 27, 1825, he says, "the company (meaning the Port Lawrence Company) were and are largely indebted to me; and at the request of Mr. Baum, trustee, I continued, after disposing of my interest in the company, to aid in the perplexing business of the concern, as I understood the details better than himself." And in reference to Mr. Prentice, a purchaser of the Port Lawrence Company, he says, "I procured him a deed, and other things, for his advantage. Mr. Prentice knows I would not have acted without authority," &c. In 1823, Prentice swears, "being at Cincinnati, to settle for work done at Port Lawrence, where he saw Oliver and Baum, and was told by both of them that Oliver was still the agent of the proprietors of Port Lawrence."

Having examined the authority under which Baum and Oliver acted, we will now consider their acts, separately and conjointly, as they are supposed to be connected with the merits of this case.

The assignment of tracts three and four was made by Oliver to Baum, the 15th September, 1821; and about the same time the Platt company assigned to him tracts one, two, eighty six and eighty seven, and also the five quarter sections; and at the same time Baum appointed the defendant, Micajah T. Williams, agent, to relinquish to the Government tracts one and two, and to apply the money which had been paid on them to the full payment of other tracts.

The assignment of the tracts owned by the Port Lawrence Company may have been made in pursuance of the trust vested in Baum; but the complainant asserts that the five quarter sections were assigned to him, to enable him to apply to their full payment a part of the money arising from the relinquished tracts. There is no evidence which contradicts this averment, and the circumstances of the case go strongly to establish it.

The act of the 2d March, 1821, under which the relinquishment was made, requires "the legal holder of any certificate, or certificates, to file a relinquishment with the register of the land office, and to apply the money which had been paid on the relinquished tract to the payment of others." An assignment of the five quarter sections to Baum enabled his agent to complete the payments on them by the above appropriation.

The bill alledges, that tracts one and two were relinquished by the Port Lawrence Company, with the intention of repurchasing them. This is denied by the answers; and Judge Burnet, in his deposition, states that he was a member of the Port Lawrence Company, and was unapprized of any such intention.

On the 20th January, 1822, four months after the relinquishment, Baum prepared a petition to Congress, stating the purchase of the two tracts relinquished, the purchase money for which amounted to about twenty thousand dollars; that in August, 1817, a town was laid out on them by him, and that many of the lots were sold, and bonds for a title given to the purchasers; that the reduction of the price of the public lands by Congress, and the pressure of the times, disabled him from paying the purchase money to the Government, and he was obliged to surrender the tracts to the United States; that being unable to make titles, he was liable to suits for damages by the purchasers of lots; and he prays that the tracts might be again offered for sale, or that relief in some other form might be given him.

This petition was forwarded to Mr. Ross, a member of Congress from Ohio, who presented it to the House of Representatives.

On the 25th December, 1822, Baum forwarded a duplicate of the above petition to Congress, in a letter to Mr. Brown, a Senator from Ohio, in which he says: "Inclosed is the petition, signed by myself only; still, others have an interest in it;" naming Williams, Piatt, and others; and he speaks of the just claim which he and his associates had for redress. In another letter to Mr. Brown, on the same subject, of the 6th February, 1823, he says—"the tracts purchased by himself and his associates can be ascertained at the land office."

The 20th January, 1823, Baum agreed with Prentice, who purchased lot 192, that if Baum and his associates should repurchase lots one and two, so as to be able to make a title to lot 192, they might do so, and Prentice agreed to relinquish the 30 acres, in lot 86, which he had received in lieu of it; and a similar arrangement was made with Jacob Bromley for lot 71, in Port Lawrence.

In a letter to Mr. Graham, the Commissioner of the General Land Office, dated 20th July, 1827, Baum says: "In consequence of the President's proclamation, announcing the sales of lands, he attended at Delaware, on the 9th instant, but was much disappointed to find that, by the instructions of the General Land Office, lands north of the Ohio boundary were not offered for sale;" and, he says, that he went there for the express purpose of purchasing tracts one and two, in the Maumee reservation, which he had formerly owned, and relinquished. He says, "these lands were bought in the names of different persons, and were afterwards transferred to him, as agent, for the purpose of managing and conveying them, in case of sales." He says, "he petitioned Congress on the subject early in 1822, but believes no decision has yet been made; that the case was still before Congress, and he hopes for a favorable result." It is intimated, he remarks, "that the trustees of the seminary lands of the Michigan Territory have had sufficient influence to delay the sale, with a view to locate those two tracts; and he protests against such an arrangement, as they have no claim to the lands whatever, but that his is a strong claim, and that he was determined to pursue it in every possible way, until he obtained justice."

Prentice, a witness, swears that he, having purchased a lot in Port Lawrence, went to Cincinnati, in 1823, to claim an adjustment of his demand; and, whilst there, Baum told him that tracts, one and two, had been surrendered to the United States, but that he expected he, and his associates, would purchase back said tracts, and go on with the building of the town; and that, in such an event, the witness should have the lot, surrendered by him, at the original price and interest. For this lot, Baum sold to Prentice 30 acres, in tract 86, which Prentice agreed, in writing, to relinquish for his original lot, should the

above purchase of lots, one and two, be made. A similar contract was made with Bromley.

On the 13th January, 1830, an act of Congress was passed, which authorized the trustees of the University of Michigan "to exchange, with Martin Baum and others, the tracts of land designated as river lots, numbered one and two, in the United States reserve, &c., heretofore purchased from the U. States, and which have been relinquished by the said Martin Baum," &c.—which tracts, under the act of the 20th May, 1826, had been selected by the Secretary of the Treasury for said University—"for such other lands as may be agreed upon by them."

As before remarked, Baum, as the agent of the Port Lawrence Company, on the 10th September, 1822, gave to Oliver a certificate, that there was due to him from the Piatt Company, two hundred and thirteen dollars and ten cents.

Of this transaction, the defendant Oliver, in his answer, says, "he was occasionally authorized by Baum, soon after the relinquishment, to take up claims of purchasers of lots in Port Lawrence; which he did, and the amount was refunded to him by said Baum. In this way, in 1822, he paid to purchasers, for their claims, \$426 14, expecting Baum to refund the same, on his return home. But, on presenting his account, Baum declined paying it, alledging that the Piatt company had refused to contribute any further, and that he must get their share out of that company."

On the part of the complainant, it is insisted that, at the time this certificate was given, no part of the amount was owing by the Piatt company.

To this inquiry the defendants object, that they are not responsible for Baum's errors, and that their title was derived under a judgment at law.

So far as it may be necessary to consider the judgment merely, and the proceedings under it, collaterally, we can neither go into the grounds of the action, nor the technicality of the procedure. If the Court had jurisdiction of the subject matter, by a levy of the attachment, we can not avoid the effect of the judgment, by errors either before, or after, its rendition. But there are other aspects of the case, arising from the relations and acts of the parties, in which this inquiry may be important.

Prior to the date of the certificate, Oliver states, in his answer, that, having made similar disbursements for the Port Lawrence Company, they were refunded by Baum. The account against the Port Lawrence Company, made out by Baum, as agent, it is presumed, contains an account of all his disbursements. This would seem to be the case from an inspection of the account. The first item, of \$59 50, is for so much paid to Williams, for services, as agent, under the relief law. The next is, for \$221 07, paid Oliver, the 21st October, 1821, for so much refunded by him to Port Lawrence purchasers of lots. And the next charge is, for \$426 04, paid to Oliver, on the same account, on the 10th September, 1822. This must be the sum to which Oliver alludes, in his answer, as having been paid by him, and for the one half of which the above certificate was given by Baum.

From the account of Baum, including the above sum, it appears he had paid, as agent of the Port Lawrence Company, the 10th September, 1822, the date of the certificate, \$706 61; one half of which sum, being \$353 30½, was justly chargeable to the Piatt company.

In the account, Piatt is credited with \$25, paid to Williams, in 1821; and there remains the sum of \$474 59, which belonged, as has been shown, to the Piatt company, but which was applied, at the relinquishment of tracts, one and two, to the

payment of lands which had been entered by the Baum company.

It is stated there was an arrangement with John H. Piatt, that the Piatt company should receive, in payment for this sum, Miami Exporting Company paper, which was at a discount of more than fifty per cent. Of this agreement, there is no evidence, except a memorandum in the account of Baum; and, by whom made, or on whose authority, does not appear. If it may be supposed to have been made by Baum, yet it may not have been made on his own knowledge of the fact. It is very singular that this sum, having been received by the U. States, as equal to specie, from the Baum company, in payment for land, should be agreed to be received by the Piatt company, when it might be convenient for the Baum company to pay it, in bank paper worth not more than forty cents to the dollar. That the Piatt company agreed to receive the payment of this sum, in this manner, is so unreasonable as not to require our belief without evidence. The memorandum appears to have been loosely made, about two years after the relinquishment, and is without any authentication. It is not a matter which is properly an item in an account, and can, therefore, derive but little, if any, force from the manner in which it is brought into the account.

In the account there is a credit entered for half the amount of this sum, to the Piatt company; but we think, under the circumstances, the credit should have been for the full amount. But whether the credit should have been for the whole, or one half of the amount, the certificate, given by Baum to Oliver, was incorrect.

If the Piatt company were entitled to a credit for the full sum, on the 10th September, 1822, the Baum company were in debt to them about \$140; if for but half the sum, they were in arrear to the Baum company only \$91.

About six weeks after Oliver obtained the certificate, he wrote a letter to the complainant, informing him that he had the account against the Piatt company, and, as he did not know the particular interest of the members of that company, he asked the favor of the complainant to state to him the proprietors, and their respective interests; and he also asked him to say when it would be convenient to arrange his proportion. What answer, if any, was returned, does not appear; nor does it appear that the complainant paid any part of this claim. Whether, having a knowledge that the Piatt company could not be in arrear for the payments made to the purchasers of lots, or from mere negligence, the complainant failed to pay the whole or any part of this claim, we are left to conjecture.

An attachment was issued by Oliver on this demand, as before stated, the 5th October, 1825, in the county of Monroe, and Territory of Michigan. As an excuse for this proceeding, he alledges, in his answer, that Worth and Worthington, of the Piatt company, had left Cincinnati; that John H. Piatt had deceased, and his estate was insolvent.

John H. Piatt departed this life in February, 1822, and his estate, which was very large, it is admitted, was found to be insolvent. But it does not follow that his representatives would not have paid a small sum, to save the estate from a sacrifice of property, if it had been demanded of them. However this may be, it is not denied, and seems to be admitted, that the complainant, who lives near the Ohio river, in Kentucky, about forty miles below Cincinnati, is a man of large property; and, it appears, that he was often at Cincinnati, and might have been made amenable to process issued at that place. Under these circumstances it is unaccountable, if the defendant Oliver had no other object than to collect the small demand of \$213, that he should have resorted to an attachment in Michigan, more than two hundred miles distant from Cincin-

nati, the place of his residence. In addition to this consideration, the Baum company, as partners of the Port Lawrence Company, were liable, equally with the Piatt company, for the payment of this sum; and, in fact, a suit could not have been sustained against a part of the Port Lawrence Company, under a proper defence, for a debt due by that company. 1 Story's Equity, 629. *Bosenquet v. Wray*, 6 Taunt. 597. 2 Bos. & Pull. 120.

But, if this were known to the defendant, he had little ground to apprehend any difficulty, in prosecuting the suit, in a foreign and so remote a tribunal. Of the pendency of the attachment, no one of the Piatt company seems to have had notice, until long after the judgment was entered.

The object of the bill, in this case, is to open up the accounts of the parties, and to set aside, or disregard, the proceedings by attachment; and, also, the decree of foreclosure, and sale of the mortgaged premises, for the reasons alledged. And we are now to consider the attachment suit.

Several objections are taken, which might well be urged, on a writ of error, before a court which could supervise the judgment of the Monroe court; and, it is contended, that they may be here considered and decided. We think otherwise. So far as the question of jurisdiction or fraud is made, or the effect which the relations of the parties may have, the case is fully and fairly before us; but, beyond this, we can not go.

The County Court of Monroe appear to have a right to issue a writ of attachment, and, from the record, it seems the writ was levied. We can not, now, examine any matter which might have been pleaded in abatement; but an important question has been raised, which goes to the foundation of the action, and this we may examine. We do not refer to the fact of the indebtedment of the Piatt company, which has already been in-

vestigated, but to the question, whether the interest of the company, in these quarter sections, was liable to be attached?

Under the writ, the rights and credits of the defendant may be attached; but are not these rights and credits demands on which a suit at law may be brought? In some respects, an attachment differs from an execution. A chose in action, or an existing debt, however evidenced, can not be reached by an execution, but may be levied on by an attachment.

It is clear that the estate, in the hands of the trustee, is not subject to any of his incumbrances. He holds it for the benefit of the cestui que trusts, and it is not subject to his specialty, judgment, or the dower of his widow. 1 Peer Wm. 278. 2 Id. 318.

The members of the Piatt company hold a resulting trust in the premises, which is not evidenced; it is believed, by any deed or agreement in writing. This interest, clearly, could not be reached by an execution; but may it be attached? Under the statute of frauds in England, a trust estate may be sold on execution; but such sale is by virtue of the statute. That it may be made liable to creditors, by a proceeding in chancery, is not contested; and it would seem that this is the most appropriate, if not the only, mode by which such an interest can be made liable to creditors.

On an attachment, how is the nature of the trust to be ascertained, and the extent of the interest of the cestui que trusts? These things, as in the present case, may not be evidenced by writing; and a court, on an attachment, have no means of ascertaining them. It would seem, indeed, that all the objections to a transfer of such an interest on execution, equally apply to a transfer on an attachment. The vagueness and confusion, and probable sacrifice of property would be as great in the one case as in the other.

The language of Lord Ellenborough, 8 East. 481, though made in reference to a sale of an equitable interest on execution, may well be applied to this case. "The sheriff could only sell, subject to the trusts; that the execution creditor, or the vendee, would still be obliged to go into equity to get an account, or to redeem prior incumbrances, which might have been done, in the first instance, by a judgment creditor, with less expense and delay, besides the destruction of the debtor's estate, which, under so much doubt and difficulty, would sell greatly under value; so that a large equitable interest might be exhausted in satisfaction of a small demand, to the detriment of other creditors."

At common law it is a well settled principle, that an equity is not liable to an execution. In some of the States it has been held that an equity of redemption may be so sold, and, in others, such an equity is made subject to execution by statute. But wherever the common law rule prevails, an equitable interest can not be sold on execution. 1 Ves. jun. 431. 5 Bos. & Pull. 461. 6 Rand. 255. 4 Kent's Com. 153, 154. *John P. Vanness v. Hyatt et al.*, 13 Peters' Rep. 294. 2 Saund. 11.

In the case of *Clark's Executors v. Wilson*, 3 Wash. C. C. Rep. 560, it was held that a foreign attachment will not lie to recover damages, for the breach of a contract, where the damages are uncertain, and without any rule, furnished by the contract itself, for their measurement.

In the case of *Pratt et al. v. Law et al.*, 9 Cranch, 456, it was held that, in the State of Maryland, an equity of redemption is liable to an attachment. But the Court, in that case, say: "we are not now at liberty to enter into the consideration of the question, whether an equitable interest, in lands and tenements, is subject to attachment under the laws of Maryland, as the Court of Appeals of that State had decided the

point. That decision was made under the provisions of the attachment law of that State.”

In looking into the report of that case it will be found that, although the effect of the judgment of the Court of Appeals of Maryland was correctly stated by the Supreme Court, yet the Court of Appeals, in fact, decided the case on a different point. Subsequently to that case, an act of Maryland subjected the equity of redemption to legal process.

In the 2d of N. Hampshire Rep. 13, and 10 John. Rep. 481, it is decided that an equity of redemption can not be attached. In the case of *Badlam v. Tucker et al.*, 1 Pick. Rep. 399, it was said that it was only by statute that equities, or rights to redeem, are subject to attachment by ordinary process. A creditor can reach such an interest of his debtor only by resorting to a court of equity.

But the interest of the Piatt company was not an equity of redemption, in which the mortgagor, for many purposes, may be considered as holding the legal estate. The legal estate being in the Government, the trustee could, at most, have held only an equity, subject to the equity of his cestui que trusts. And how is such an interest to be reached by an action at law?

There is believed to have been no statute or rule of decision in the territory at the time, which made such an interest liable, at law, to the claims of creditors. And, by the rules of the common law, we think it could not be levied on by an execution or an attachment. We can perceive no reason why this interest should not be liable to both these processes, if liable to either.

If the interest of the Piatt company in these quarter sections could not be reached by a proceeding at law, the defendant acquired no right, by his purchase, under the attachment.

It is insisted, if this were the case, that "equity is not the place to vacate judicial proceedings for technical formalities." But is this a technical formality? It has no reference to the technical mode of proceeding in the attachment, but goes to the foundation of the suit. If the interest in these lands was not liable to an attachment at law, is the question merely a formal one? And why may not the question be raised as well in a court of chancery as in a court of law?

It was the proper service of the attachment only which could give the Court jurisdiction. And if the writ were attempted to be served by attaching an interest which was not attachable, the Court could legally take no jurisdiction, and their proceedings were void. This does not vacate the proceedings. They stand as they at first stood. But they were coram non judice, and not binding upon any one.

In the case of *Vanness v. Hyatt*, above cited, which was a proceeding in chancery, the Court held that the sale of an equity of redemption, on execution, was void, such an interest not being liable to execution. "Courts of equity will, in effect, examine the judgments of foreign courts, and even the sales made under those judgments, where fraud has intervened, or under the judgments a grossly inequitable advantage has been taken. In such cases, they do not disregard such judgments, or directly annul them; but they determine the equities of the case in the same manner as if the proceedings had been matters in pais, subject to their general jurisdiction." 2 Story's Eq. 531. *Lord Clarendon v. Johnston*, 3 Ves. jun. 110. *Jackson v. Petrie*, 10 Ves. 165. *White v. Hall*, 12 Ves. 321.

But if the purchase, under the attachment, be invalid, may not the defendant assert his right to these lands under the assignment from Baum?

There can be no doubt that, under this assignment, he was enabled to obtain the patents in his own name. If the record

of the attachment suit, and the deed of the creditors only had been presented to the land office, the proceedings would not have been considered, it is presumed, as authorizing patents for the different tracts to be issued in the name of the defendant. The assignment of the certificates by Baum, and this only, enabled the defendant to perfect, in form, his title.

It is contended that Baum held these lands in trust, to make good payments that might become due from the Piatt to the Port Lawrence Company. And, it is strongly urged that, at least, the Port Lawrence Company had a lien on these lands for the sum of \$1,248, paid on them by a transfer of that sum, at the time tracts one and two were relinquished.

That these quarter sections were purchased by the Piatt company on their own account, at the public sale, is admitted. And the complainant alleges that they were assigned to Baum in September, 1821, in order that payments on them to the United States might be completed under the relief law, and for no other purpose. And these payments were made, it would seem, in pursuance of this intention.

This allegation of the bill is not positively denied by the answers, but the defendants say they have no recollection of it, and that they understood the lands were held by Baum as a pledge for payments by the Piatt company, and that Baum had power to sell them.

Now, at the time these tracts were assigned, it is not probable they could have been given as a pledge or security, as at that time there were no demands against the Port Lawrence Company, except from the United States, which were paid by the relinquishment. And, if such an agreement were made subsequently, where is the evidence of it? This matter, set up in the answer, is not responsive to the bill, and requires proof, and there are no facts or circumstances of the case which conduce to show that there was any such agreement or under-

standing between the parties. On the contrary, the facts and circumstances go strongly in support of this allegation in the bill, and the answers do not positively deny it. We feel ourselves authorized, therefore, to assume the fact, as proved, that the object of the assignment to Baum of these quarter sections, by the Piatt company, is truly stated in the bill.

But was there a lien on these lands by the Port Lawrence Company, on account of the \$1,248 paid on them?

It will at once be admitted that the lien, if any, on these lands was of the same nature as a lien on the lands of the Baum company, paid for at the same time, and with a part of the same fund. And if Baum could, under this lien, sell the Piatt company lands to pay the debts of the Port Lawrence Company, he could sell the Baum company lands for the same purpose.

After paying in full for the lands still held by the Port Lawrence Company, the surplus fund belonged equally to the Baum and Piatt companies; and, it being paid to them in that proportion, no ground is perceived on which to raise a lien on the fund, or on the lands purchased by it, which would not apply generally to the property owned by the respective companies.

The fund being paid, was mixed up with the other property of the companies, and how could it afterwards be separated? The argument is, that the fund, having been applied, draws after it, and subjects to the same lien, the whole property with which it is connected.

There are cases where an agent mixes up the funds of his principal with his own, that this consequence may follow; but these cases, in fact and in principle, are wholly dissimilar from the one now under consideration. But it is unnecessary to argue this point. If the lien existed, it did not authorize the assignment of the certificates by Baum. A lien is a charge upon the thing, and not a property in it. 2 Story's Eq. 461. 2 P. Wm. 20. *Ex parte Knott*, 11 Ves. 617.

Baum received the assignment of the certificates for a specific purpose, and, that purpose being accomplished, he was a mere recipient of the title, having no power over the land. Nor is it necessary, on this point, to discuss the question, whether the relation which Oliver bore to the Port Lawrence Company, as agent, forbid his purchase of these lands. He took the assignment of the certificates with a full knowledge of the nature of the trust vested in Baum.

If he did not know these were the lands of the Piatt company, why did he proceed against them by attachment as such? And why, it may be emphatically asked, did he prosecute a demand against that company, for which the Port Lawrence Company were liable? Oliver had been a member of the Port Lawrence Company, and as an agent, for a time at least, managed their principal concerns. In his own words, "he was better acquainted with the concerns of that company than the trustee." No man understood better than he the interests of the Baum and Piatt companies, separately and conjointly. Having this knowledge, the assignment of these certificates to him, by Baum, could convey no greater interest than was vested in the assignor. Oliver, as assignee, must, therefore, be treated as holding the lands in trust for the use of the cestui que trusts, subject to any equitable or legal liens which may exist. 2 Peer Wm's, 706. 1 and 2 Cruise's Di., title 12, ch. 4, 489.

We come now to examine that branch of the case that rests on the mortgage and the proceedings under it.

The mortgage was given by Baum, as before stated, on tracts three, four, eighty six, and eighty seven, to secure to Oliver the payment of an account against the Port Lawrence Company, amounting to the sum of \$1,835 47.

With the view to sustain the charges in the bill, the counsel of the complainant have entered into a detailed statement and argument to show that this account was incorrectly stated, and

that a part of it only was due the 9th June, 1823, when it was exhibited.

The entire account amounted to the sum of \$2,727 41½, of which sum \$1,536 48½ appeared to be due to Oliver and Baum for the purchase money paid on town lots 223 and 224, and moneys expended in making improvements thereon, including interest. Without any impeachment, it may be remarked, as a singular circumstance, that the trustee and agent, being equally interested in this part of the account, should have acted upon it, and that the trustee should have executed a mortgage on the entire property of the Port Lawrence Company for the payment of it, and the additional sum of \$1,180 93 for so much money paid to Stickney and Henderson.

On the account of Oliver there was a credit of \$773 24, cash paid by Baum, and two other small items by Prentice and Hunt, which being deducted from the gross amount of the account, left the balance for which the mortgage was given.

That Baum, as trustee, had a right to sell and convey lots in the town of Lawrenceport, is clear; indeed, that seemed to be the principal object in vesting him with the title. It is not equally clear that this right to sell and convey extended to the other tracts. But taking this as granted, what interest did the mortgage cover? The fee being in the government, the equity only was covered by the mortgage; it was, then, in this sense, an equitable mortgage. About the one half of the sum for which it was given was payable to Oliver as the partner of the trustee. Independent, then, of this partnership transaction, there was raised by this mortgage about the sum of one thousand dollars, for the benefit of the Port Lawrence Company, which could have afforded that company but little relief. But small as was the sum, it will be found in the sequel to have been more than enough to purchase, at the

sale under the mortgage, the whole of the property of the company.

Proceedings were instituted on the mortgage the 13th October, 1825, in the Supreme Court of the Michigan Territory. Baum only was made defendant; a decree for the sale of the premises was obtained, and they were sold to the defendant for the sum of \$618 56 the 1st of September, 1828.

Was this sale binding on the members of the Port Lawrence Company, who were not made parties to the suit?

That every member of the company was directly interested in the suit, is evident. But it is contended that "the title by the certificates being in Baum, and the interest of all the others being involved in his title, they were not necessary parties to the proceedings." And, in support of this proposition, 2 Brokenborough's Rep. 21, and 8 Ohio Rep. 500, are cited.

The case in Brokenborough is not similar to the one under consideration. All persons having distinct interests, says the late Chief Justice, "must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. Thus, he says, a trustee may sue without naming the cestui que trust as a party." &c. That suit may be maintained in some cases in the name of the trustee, without naming the cestui que trust, is admitted; but this can not be done where the object of the suit is to divest the vested right of the cestui que trust.

The Court held, in 8 Ohio Rep., above cited, that a deed which conveyed certain lands in trust could be set aside at the suit of the grantor, on the ground of fraud, without making those who might claim in remainder or reversion, parties. The

right barred in that case had not vested at the time of the decree.

In the case of *Caldwell v. Taggart et al.*, 4 Peters' Rep. 202, the Court say—all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit, extending in most cases to heirs at law, trustees, and executors. Thus, where a remainderman in tail brought a bill against the tenant for life, to have the title-deeds brought into court, and there were annuitants on the reversion, and a child interested for a term of years prior to the limitation to the plaintiff; that is, incumbrances prior and posterior to the plaintiff's, Lord Hardwicke, 3 Atk. 570, refused a decree without first making them parties.

So, where a husband, tenant for life, remainder to his wife for life, remainder over, brought his bill, without joining the wife, the objection was made and sustained, on the ground that if there was a decree against the husband it would not bind the wife. 1 Atk. 289.

To a bill of foreclosure of a mortgage, all incumbrances, or persons having an interest at the commencement of the suit, subsequent as well as prior to the plaintiff's mortgage, must be made parties, otherwise they will not be bound by the decree. *Haines and others v. Beach and others*, 3 John. Ch. Rep. 459. *Draper v. the Earl of Clarendon*, 2 Vern. 517. *Godfrey v. Chedwell*, 2 Vern. 601. *Hobert v. Abbott*, 2 P. Wms. 643. *Fall v. Brown*, 2 Brown's Ch. Rep. 276. *Polk v. Clinton*, 12 Ves. 48, 59. *Monday v. Monday*, 4 Ves. 223.

A bill of foreclosure against parties to whom an equity of redemption had been assigned upon trust for sale, and to divide the surplus among certain persons named, was held defective for want of the cestui que trusts, as parties interested in the equity of redemption not being made parties, although it was provided by the deed, that the receipts of the trustees should

be a discharge. *Colverly v. Philps and others*, 6 Madd. 229.

In Story's Eq. Pl. 187, it is laid down as a general rule, in cases of trusts, that in suits respecting the trust property, brought either by or against the trustees, the cestui que trusts, as well as the trustees, are necessary parties. And where the suit is by or against the cestui que trust the trustees are, also, necessary parties. The trustees have the legal, the cestui que trusts the equitable, right; they are both, therefore, necessary parties to protect their interests. Cooper's Eq. Pl. 34. Mitf. Eq. Pl., by Jeremy, 176, 179. *Adams v. St. Leger*, 1 B. and Beat. 181, 184, 185; 1 Sim. and Stu. 105. *Wood v. Williams*, 4 Madd. Rep. 186. *Burt v. Dennet*, 2 Bro. Ch. Rep. 225. *Osborn v. Fellows*, 1 Russ. and M. 741. *Malin v. Malin*, 2 John. Ch. Rep. 238.

If a trustee bring a bill for a specific performance of articles, the cestui que trust should be made parties. *Douglass v. Horsfall*, 2 Sim. and Stu. 184. 2 John. Ch. Rep. 238. Story's Eq. Pl. 188, 189.

So if a bill for the redemption, or a bill for the foreclosure, of a mortgage, should be brought against a trustee, the cestui que trusts are in each case necessary parties. Story's Eq. Pl. 190. *Colverly v. Philps*, 6 Madd. Rep. 229. *Whistler v. Webb*, Bunb. Rep. 53.

There are some qualifications to this rule, as where there is a fixed trust fund, and each cestui que trust has a certain aliquot part in it, distinct from the others, so that there is no common interest in the object of the bill; the others need not be made parties. *Smith v. Snow*, 3 Madd. Rep. 10. *Montgomerie v. Marquis of Bath*, 3 Ves. 560. *Lowe v. Morgan*, 1 Bro. Ch. Rep. 225.

If the demand upon the trust property existed before the creation of the trust, a suit may be sustained against the trus-

tee, without making the cestui que trusts parties. Story's Eq. Pl. 191.

And where there is a general trust for creditors or others, whose demands are not specified in the creation of the trust, as their number or the difficulty of ascertaining who may answer, &c., it is not necessary to make all the creditors parties. The bill should state, in such case, that it is filed in behalf of all interested. Story's Eq. Pl. 192.

And it is upon this ground of the numerous parties, as well as upon the ground of a virtual representation, and of the general nature of the trust, that trustees of real estate for the payment of debts may ordinarily sustain a suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they are trustees, which, in many cases, would be almost impossible. Story's Eq. Pl. 192

All these modifications of the rule rest upon the ground that it would be extremely inconvenient, if not impracticable, from the number of persons interested, to make them parties. But no such excuse exists in the present case. The cestui que trusts were not numerous, and they were known to Oliver, and should have been made parties to the bill to foreclose the mortgage. They were, in fact, the only persons beneficially interested in the mortgaged property, and not being made parties to the suit they are not bound by the decree.

But if the purchase of the mortgaged premises under the decree gives no right, as against the cestui que trusts, who were not parties to the suit, it is contended that the assignment of the certificates by Baum, he having power to sell, must vest Oliver with the equitable title.

The facts which led to this assignment are before the Court. There was no sale of the premises by the trustee to the defendant. The transfer was made with the view to give effect to the purchase under the decree. If the decree were not

binding on the cestui que trusts, the assignment which was founded on it must be equally invalid. The question is not before us, and, from the facts established, can not be made, whether the trustee had not power to convey to Oliver, by sale, the interests of the cestui que trusts.

But after the execution of the mortgage, had the trustee power to sell? In Sugden on Vendors, 278, it is laid down, that a power to sell and raise a sum of money implies a power to mortgage, which is a conditional sale. *Mills v. Banks*, 3 P. Wms. 9. And a power generally to raise a sum out of an estate, enables a sale of it. *Wareham v. Brown*, 2 Vern. 153.

It may be well to inquire whether the trustee in this case, in making the mortgage, exhausted his power. *Polk v. Clinton*, 12 Ves. jun. 48. *Amerad v. Hardman*, 5 Ves. jun. 722.

A power to a tenant for life to grant leases was destroyed by a mortgage made by him, and a tenant for life in remainder under the same settlement. 5 Vin. Abr. 432, pl. 10. Sugden on Vend. 56. A conveyance of the whole life estate, although by way of mortgage, is deemed an extinguishment of a power appendant or appurtenant. Sug. 57.

The assignment of the certificates in this case by Baum, as in the attachment case, enabled Oliver to obtain the patents in his own name. But this can not affect the relation he bears to the cestui que trusts; he must be considered as holding the lands as mortgagee, and not as a purchaser.

The bill charges that tracts one and two were relinquished with the intention of repurchasing them. But, as before remarked, of this intention, at the time, there is no evidence, and it is denied in the answers.

It appears, however, within four months after the relinquishment, Baum petitioned Congress on the subject, and placed his claim for relief exclusively on the fact, that, under

the former purchase, he had sold town lots, and that improvements on the lots had been made by purchasers, which would subject him to damages; and he prayed that these tracts might again be offered for sale, or that relief in some other form might be given. And in his letter to Senator Brown the ensuing year, 1823, which inclosed a copy of this petition, he stated that others were interested with him in the matter of his petition, although the petition was signed only by himself. And, again, in 1827, in his letter to the Commissioner of the General Land Office, complaining that the above tracts had been withdrawn at the land sales at Delaware, in 1827, at which place he had attended with the intention of purchasing them, he states the claim of himself and his associates to these lands, and remonstrates against their being located for the Michigan University, as they could have no claim to them. And so far from abandoning his right, he says, it is still before Congress, that he hopes for a favorable result, and expresses a determination to pursue it until he obtains justice.

At this time the suits of Oliver were pending in Michigan by attachment and to foreclose the mortgage, and, indeed, a judgment had been entered on the attachment, and the sales, under both suits, took place the ensuing year.

In the summer of 1828, before these sales, the tracts one and two having been selected for the University, Oliver proposed, as the agent of Baum, to its trustees to exchange a certain part of the lands, then held in the name of Baum, for tracts one and two. And eventually this exchange was effected in January, 1831. Previous to this, on the 13th January, 1830, passed the law which has been referred to, authorizing the University to make the exchange with Martin Baum and others. In 1831 deeds were executed, and Oliver became the patentee of tracts one and two; and shortly afterwards Baum and Williams became interested with him in laying out a town

on the site of Port Lawrence; and they proposed to make titles to the former purchasers of town lots, on their complying with the conditions of sale.

Now, when we consider the agency of Baum and of Oliver, and scrutinize the acts of both, as above stated, without explanation, it would be difficult to resist the conclusion, that, in obtaining tracts one and two, they acted in behalf of the Port Lawrence Company.

After the relinquishment of tracts one and two, there can be no doubt that either Baum or Oliver had a right to purchase them.

But it would seem the petitions of Baum to Congress in behalf, as he declared, of himself and his associates, his letter to Senator Brown in 1823, and especially his letter to the Commissioner of the General Land Office in 1827, the passage of the law in 1830, authorizing Baum and others to exchange lands for these tracts, connected with the application to the trustees of the University by Oliver, as the agent of Baum, to exchange lands owned by Baum and others for them, form a combination of circumstances conducing strongly to show that tracts one and two were obtained for the Port Lawrence Company.

But it is insisted by the defendant's counsel that these circumstances are so explained as to show that, neither the application of Oliver to the trustees of the University, nor the law authorizing the exchange, had any reference to the interests or proceedings of Baum, as agent of the Port Lawrence Company. That his name was used in the proposition to the trustees to exchange by Oliver, who represented himself as the agent of Baum, is admitted. At least the answer of Oliver admits that such is the entry in the proceedings of the trustees; but he alledges that the proposition was made on his own account, and that the name of Baum was used, like the names of

others, without his knowledge, and for the purpose of assuring the trustees, should they sanction the exchange, that a town would be built up on tracts one and two. This explanation involves the defendant in an act equivocal in its character, and which can scarcely be justified. If the names thus used formed an inducement to the contract by the trustees, as the defendant admits he supposed they would, and he was wholly unauthorized to use them as he now says, unless this fact was stated in his proposition, the trustees, on this ground, might have claimed a rescission of the contract.

From the answer of the defendant, Williams, if that could be received as evidence in favor of his codefendant, it appears that his name was used in the negotiation with the trustees without his knowledge. And in the deposition of Mr. Wing, it is stated that the witness understood (of course from Oliver) that the name of Baum was used because, at the time the proposition was made, the title was in him, and that "Baum was ultimately to become interested."

But whether Baum and Oliver co-operated or not, as agents of the Port Lawrence Company, in obtaining the title to tracts one and two, may make no difference in the final decision of this case. In conformity with the view taken, Oliver could set up no title to the lands under the judicial proceedings stated, but must rely upon his assignment from Baum. And, under the assignment, having notice of the trust, he could take no greater interest than Baum possessed. That, in relation to the cestui que trusts, though he obtained from the government the legal title, yet he holds it only in trust. This position being sustained, so far as Oliver is concerned, it only remains to examine what effect was produced on the interests of the cestui que trusts, by a conveyance to the University of tracts three and four, and three of the quarter sections, in exchange for tracts one and two.

 Platt v. Oliver, Williams, et al.

It is a well established rule, in equity, that no act of a trustee shall prejudice the cestui que trust. Cruise's Di. Title 12, chap. 4, 488. 2 P. Wms. 706. 1 Story's Eq. 317. Newland on Contracts, 461. *Ex parte Lacy*, 6 Ves. 625, 626. 1 Madd. Ch. Rep. 92, 93. *Chesterfield v. Janssen*, 2 Ves. 138. *Ex parte James*, 8 Ves. 337, 345. *Ex parte Bennet*, 10 Ves. 381, 385. *Cane v. Lord Allen*, Daw. Rep. 289, 299. *Van Horn v. Fonda*, 5 John. Ch. Rep. 338. *Brown v. Rickets*, 4 John. Ch. Rep. 303. 1 John. Ch. Rep. 510, 535, 623, 629.

Where the trustee purchases the estate of his cestui que trust, the question is not whether he has made a profit, but the sale is set aside as a matter of course, unless ratified with a full knowledge of the circumstances by the cestui que trust. 1 Story's Eq. 318. *Davou v. Fanning*, 2 John. Ch. Rep. 252. *Campbell v. Walker*, 5 Ves. 678, 680; 13 Ves. 601. *Moore v. Royal*, 12 Ves. 355.

If a trustee purchase land with the trust fund, and take the conveyance in his own name, in equity, the land is held as a resulting trust for the person beneficially interested. 2 Story's Eq. 456. 2 Fonbl. Eq. B. 2, ch. 5, sec. 1, note 6. *Deg v. Deg*, 2 P. Will. 414. Sug. on Vend. ch. 15, sec. 3, 628. *Perry v. Phillips*, 4 Ves. Rep. 107; 17 Ves. 173. *Bennet v. Mayhew*, 1 Bro. Ch. Rep. 232.

The rule is, whatever acts are done by the trustee, are presumed to be done for the benefit of the cestui que trust, and not for the benefit of the trustee. 4 Kent's Comm. sec. 61. *Davou v. Fanning*, 2 John. Ch. Rep. 252. *Haldridge v. Gillespie*, 2 John. Ch. Rep. 30. *Griffen v. Griffen*, 1 Sch. and Lefroy, 352. *James v. Dean*, 11 Ves. 392. *Nesbitt v. Frederick*, 1 B. and Beatt. 46, 47. *Wilson v. Troup*, 2 Cow. Rep. 195.

Wherever the trust fund has been wrongfully converted into another species of property, if its identity can be traced,

it will be held in its new form liable to the rights of the cestui que trust. 2 Story's Eq. 503. *Ex parte Dumas*, 1 Atk. 232, 233. *Scott v. Surman*, Willies' Rep. 400. *Thompson v. Perkins*, 3 Mason's Rep. 232. *Burdett v. Willett*, 2 Vern. Rep. 638. *Murray v. Lylburn*, 2 John. Ch. Rep. 441. *Lewis v. Maddocks*, 17 Ves. 57, 58. *Haldridge v. Gillespie*, 2 John. Ch. Rep. 30. *Evertson v. Tappan*, 5 John. Ch. Rep. 497. *Hart v. Ten Eyck*, 2 John Ch. Rep. 62, 104.

The cestui que trust has his option, in cases of this sort, to insist upon taking the property; or he may disclaim any title thereto, and pursue any other remedy in rem or in personam. But he can not insist on opposite and repugnant rights. *Docker v. Semes*, 2 Mylne and Keen, 655. *Murray v. Lylburn*, 2 John Ch. Rep. 441, 442, 444, 445. *Murray v. Ballou*, 1 John Ch. Rep. 581; 2 Story's Eq. 506.

This doctrine is not limited to trustees, but extends to all other persons in a fiduciary relation to the party, whatever that relation may be. *Wormly v. Wormly*, 8 Wheat Rep. 421, 438. *Brown v. Lynch*, 1 Paige's Rep. 147. *Fellows v. Fellows*, 4 Cowen's Rep. 682.

From these authorities it would seem to follow that the Port Lawrence Company have a right to call upon Oliver to account, as trustee, for tracts one and two. If he received the assignment from Baum of the tracts which were exchanged with the University for tracts number one and two, with a full knowledge of the trust, he could, under the circumstances, only hold those lands in trust. Standing in this relation, by the exchange of these lands for tracts one and two, the cestui que trusts have a right to claim the property received in exchange for that which, in equity, belonged to them. The principle must be the same whether money or property be given in purchase of land, the trust fund or property may be followed to the land purchased, at the option of the cestui que trust.

In the present case the complainant asks not only the lands received in exchange by Oliver, but, also, those conveyed to the University. That he can not claim both is perfectly clear.

Oliver has purchased the lands from the University, which he conveyed to it for tracts one and two. And it is a question whether the Court should not limit the plaintiff's claim to the lands thus purchased. As this point can be better determined when we shall have all the facts before us, as to the present condition of the property, it is reserved.

The question of notice, as it regards the defendant, Williams, will now be examined.

In his answer he denies notice, and alledges that his various purchases, of a part of the property in controversy, were made bona fide, and for a valuable consideration; and that the purchase money was paid before he had any notice of the complainants' claim or title.

This defendant had no interest in either the Baum or Piatt Company at the time of the public sale; but subsequently, in the year 1819, he purchased an interest in the Port Lawrence Company. This is admitted in his answer.

He was appointed an agent by Baum to attend at the land office, in September, 1821, to relinquish to the United States tracts one and two, and to apply the money paid on those tracts to the payment of others, as it was applied. This necessarily gave him a knowledge of the interests of the Baum and Piatt companies, separately and conjointly. The apportioning of the funds arising from the relinquished lands, first to the lands of the Port Lawrence Company, and then to the lands of the Baum and Piatt companies, respectively, showed the joint and several interests of the companies. It is true the certificates of purchase were all assigned to Baum; but, standing in the relation which the defendant bore to the parties, he

could not but have known, when he performed the above service, that the five quarter sections belonged to the Piatt company, and had been assigned to Baum to enable him to complete the payments on them. He was, in fact, a member of the Port Lawrence Company, having an undivided interest in their property; and, as a matter of course, he could not but know in what lands he had an interest.

As a member of the Port Lawrence Company this defendant must be presumed to be acquainted with the transactions of that company. Baum, in fact, was his agent, and the legal proceedings resorted to by Oliver being in operation, no other ground of title could be assumed than the assignment. And this assignment, as has been shown, as it regards the four quarter sections assigned, was not within the scope of his power, and was, consequently, invalid; and as regards tracts three, four, eighty six, and eighty seven, the assignment rested for its validity on the decree of sale, which was not binding on the cestui que trusts, who were not parties to the suit.

These acts of the trustee or agent, being in the one case not valid for want of power, and in the other invalid, as the sale was invalid, were known to Williams. A notice to an agent is notice to his principal. *Brooks v. Marbury*, 11 Wheat. Rep. 78. And here is a case where an agent does certain acts which are not within his powers, and which, consequently, do not bind his principals; the defendant being one of them, can he set up a want of notice?

Can a cestui que trust, connected with others, purchase a part or the whole of the trust estate through the unauthorized acts of the general agent, and insist that he is a purchaser, without notice of the acts of the agent? Baum, in making the assignment, was as much the agent of Williams as if he were the only cestui que trust; and the assignment, being unauthorized, did not divest his interest. Is not Williams to be pre-

sumed to be acquainted with his own title? And, if he is, he had full knowledge of the acts of his agent Baum; and although he may have been mistaken as to the legal effect of Baum's acts, still, knowing the facts, he is responsible for the legal consequences. *Wormly v. Wormly*, 8 Wheat. Rep. 421; 1 Story's Eq. 390.

The title is thus in the hands of Oliver by the assignment of Baum, but Oliver having notice, as well as Williams, of the powers of the trustee, the lands in the hands of Oliver are still held in trust; are held, so far as the Port Lawrence interest is concerned, in trust for the defendant, Williams, and his partners. Oliver, beyond the powers of his trust, conveyed a part of these lands to the Michigan University, and received in exchange therefor tracts one and two.

Now, as has been shown, the cestui que trusts may claim the lands received in exchange. The change in the property makes no change in the nature of the trust. The defendant, Williams, then, may claim, as cestui que trust, to the extent of his interest, a part of tracts one and two, as well as a part of tracts eighty six and eighty seven. But he claims the one half of these tracts as a purchaser, without notice, from Oliver; without notice of his own title, for it amounts to that. If it can be supposed that he had notice of his own title, he had notice of the full history of the title of his partners.

If the positions of the Court on the great points of this case be correct, there would seem to be no doubt that this defendant is chargeable with notice. And as this point is considered free from difficulty, it is unnecessary to refer to the negotiations of Oliver with the trustees of the University, the recital of their deed to him, of the patent from the government to Oliver, and of those contained in the different deeds from Oliver to the defendant, to show notice.

Two grounds were urged by the defendant's counsel which have not been examined; and as much stress seemed to be laid on them, they will here be very concisely noticed. One was the lapse of time; and the other, that if, upon the whole, substantial justice has been done, the Court will not, for any informality, open up the proceedings.

In answer to the first it would be enough to say that the statute of limitations does not run against an established trust. Nor does lapse of time operate to bar in such a case, where the title has been held consistently with the trust set up. In such a case no presumption arises against the cestui que trust from lapse of time. 1 Peters' C. C. Rep. 364. *Boteler v. Allington*, 3 Atk. 459. *Cholmondeley v. Clinton et al.*, 2 Meriv. Rep. 360. 4 Eq. Rep. Dess. 474. 1 M'Cord's Ch. Rep. 395, 398. 4 Eq. Rep. Dess. 77. If the views of the Court be correct, the character of the estate was not changed by an exchange of the lands, and the obtainment of the patents by Oliver.

But, at all events, negligence can only be imputed from the time the trust property was purchased by Oliver, and but few years elapsed from the time the notice of this purchase was received until this bill was filed. Upon this view we think that lapse of time does not bar the right of the claimant.

The other ground, as to substantial justice having been done, is equally unsustainable. That the Port Lawrence Company, generally, have been remiss in not paying, in just proportion by the members, the expenses of the company as they accrued, can not be denied. And that the complainant and the other members of the Piatt company, forming a part of the Port Lawrence Company, were most negligent in this duty, is not doubted. That the trustee of the company, from his position, became involved by claims of purchasers of lots, is established by the evidence. But an examination of this branch of

the case will show that his involvement on this account was not so great as he supposed it to be. And it will appear that the account made out by him was not as full as would be required by a court of equity.

Not to refer to other accounts against the company, it appears by the one made out by Oliver for himself and Baum, for the purchase and improvement of lots 223 and 224, that whilst the company were charged for every item of expenditure in building a warehouse and a tavern, and the instalments paid on the purchase, with interest, there was no allowance for rent. The evidence shows that rent was received, but the amount is not stated.

Now, it is not always a correct mode of showing the value of an improvement by the cost of making it. And where such improvement has been occupied two or three years by tenants, it is proper, under the above circumstances, that rent should be deducted. How the trustee and Oliver, in this respect, settled with the other purchasers of lots, does not appear.

No account is taken of the eight hundred fifty five dollars and thirty three cents received at the sale, and transmitted to the trustee by Schenck. This sum may have been accounted for, as Oliver alledges in his answer, but it was proper that so considerable an item should have been stated, and not left to the memory of the trustee or his agent. Baum and Oliver appeared to have been the largest creditors of the company for improvements; and although, in the account exhibited by Oliver to Baum, there was a credit to the latter for upwards of seven hundred dollars, yet how this money was paid nowhere appears. There is no credit for this sum in the general account of Baum against the company. As before remarked, independently of this partnership account for improvements by the mortgage, Baum received the payment of little more

than one thousand dollars to the creditors of the Port Lawrence Company.

The case made by the defendants is simply this: The lands of the Port Lawrence Company, consisting of tracts three, four, eighty six, and eighty seven, have been sold, and four quarter sections owned by the Piatt company, to Oliver, for the sum of about eight hundred and sixty dollars; and there is still a large balance, more than one half, of the account of Oliver, unpaid, and this account was, for moneys paid, as agent, to purchasers of lots in Port Lawrence. With a part of the land thus sold, Oliver exchanged with the Michigan University for tracts one and two. For these tracts the Port Lawrence Company agreed to pay, some years before, about twenty thousand dollars; and this sum was less than they would have sold for, the defendants contend, had it not been for the fraudulent combination of the two companies at the public sale.

By the acquisition of these tracts Oliver became the owner of all the improvements made in the town of Port Lawrence, which proved so prolific a source of claims against the company, and which has produced to him so rich a harvest. In addition to lots one and two, he and those associated with him held, under the purchase, numbers eighty six and eighty seven, and one of the five quarter sections, having paid for the whole the sum of \$860.

From this short outline, we are mistaken if any very strong grounds of equity arise against the right of the complainant, which should control the decision of the Court.

If the complainant's equity rested on his own vigilance and punctuality, in attending to the concerns of the Port Lawrence Company, he would have but a slender foundation for a decree. But this is not the ground of his equity. It is founded on the acts of the agents, and not on what the complainant has

done, or omitted to do, since the formation of the company. He has been negligent, but this does not subject his property, and the property of his associates, to any mode of transfer, however illegal. A company or an individual can be divested of property only in the mode sanctioned by law; and, for the reasons stated, we think the mode adopted by the defendants, in the present case, was not conformably to legal principles. The course pursued, in all probability, was the result of a misconception of the law applicable to the relation of the parties and the facts of the case; and we are always gratified in being able to take this ground, instead of one which would cast a shade over the character of any of the parties. On this occasion this gratification is peculiar, from the high character sustained by the living and the dead who were the principal agents in the above transactions.

That the Court may have the facts fully before them, in regard to the present condition of the property, they order an account to be taken of the sales made in whole or in part of the tracts one, two, three, four, eighty six, eighty seven, and of the four quarter sections, designating the date and amount of sales in each tract, titles made, moneys received and due; and, also, an account of all moneys expended, either in the purchase or improvement of each tract, by the defendants, Williams and Oliver, or either of them, including compensation and expenses for the agency exercised in the general management of the property, &c.

A. Wilber v. T. Ingersoll.

A. WILBER vs. T. INGERSOLL.

The act of Ohio abolishing imprisonment for debt, except in certain cases, having been adopted by Congress, can only affect proceedings in a case, subsequently to its adoption.

Mr. *Goddard* appeared for the plaintiff, and Mr. *Gilbert* for the defendant.

OPINION OF THE COURT.

In this case a judgment was entered at July Term, 1838, and a *capias ad satisfaciendum* was issued on the judgment, returnable to the ensuing Term of December. On this process the defendant was arrested, and he gave security for the prison limits.

And the counsel for the defendant now moves the Court for a rule *ni si*, that plaintiff, within thirty days, file with the clerk an affidavit of himself, his agent or attorney, setting forth some one or more of the causes which, by the laws of Ohio, would entitle him to a *ca. sa.*, and, in default thereof, that the defendant be discharged.

This motion is opposed by the plaintiff's counsel.

By the act of Ohio, of the 19th March, 1838, imprisonment for debt, except in certain cases, is abolished, unless an affidavit be made agreeably to the statute, &c., before the suit is commenced, and, also, after the rendition of the judgment, and before final process shall be issued.

By the act of Congress, of the 28th February, 1839, the state laws, respecting imprisonment for debt, were adopted. Until the adoption of the state statute on this subject, it could not operate on causes brought in the Federal Court. And, the question is now made, whether this state law, adopted in 1839, can have the effect to release from imprisonment a defendant

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held on a *capias ad satisfaciendum*, dated in 1838, and issued on a judgment rendered the same year.

The law took effect from the time of its adoption, and all causes, then pending, were governed by it. But no retrospective operation can be given to the law.

In the case of *Gray, Sherwood & Co. v. Monroe et al.*, 1 McLean's Rep. 528, this Court gave effect to the law, by discharging the appearance bail on motion. In that case the action had been commenced, and the appearance bail taken, before the adoption of the statute by Congress; but the Court held that, as under the law, special bail, in that case, could not be required, the appearance bail must be discharged.

In the case under consideration, the proceedings had been consummated before the law took effect. The defendant was held, if not in satisfaction of the judgment, at least as a means of enforcing the payment of it. And we know of no rule of construction which shall apply the provisions, of the adopted act of 1839, to a proceeding in any case prior to that time. If any further step were necessary by the plaintiff, to coerce the payment of his judgment, such step must be taken under the existing law. The motion is overruled.

JOHN DOE EX DEM VS. JOHNSTON ET AL.

This Court will not stay proceedings on a judgment in ejectment, until the equity between the parties, of which they have jurisdiction, shall be investigated in a State Court.

But such proceedings will be stayed, where this Court have not jurisdiction of the equity.

It is sufficient service of the subpoena, on an injunction bill, to serve it on the attorney of the plaintiff in the ejectment.

A motion to quit, by the English rule, is necessary only where the relation of landlord and tenant subsists.

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Mr. *Curtis* appeared for the lessor of the plaintiff, and Mr. *Goddard* for the defendant.

OPINION OF THE COURT.

JUDGMENT having been entered, a motion was made by defendants' counsel, that further proceedings be suspended until a suit in equity, pending between the plaintiffs and defendants in the State Court, which involves the title to the premises recovered in this suit, shall be decided.

This motion was opposed by the plaintiff's counsel.

It is the practice of this Court to stay the writ of possession on a judgment in ejectment, where the defendant has an equitable right, which this Court can not investigate for want of jurisdiction, until the same shall be heard and decided in the State Court. And, if a conveyance of the legal title shall be decreed to the defendant, this Court will give effect to the decree, by a final order to enjoin the writ of possession. In this mode of procedure, great inconvenience, expense and delay, arising from the limited jurisdiction of this Court, are avoided.

But, in this case, the Court have jurisdiction of the matter in equity, as it arises between the parties to the present judgment. And, under such circumstances, to suspend the habere facias possessionem, until the defendants shall have spent their equity in a State Court, would not only virtually supersede the jurisdiction of this Court, but it would deprive the plaintiff of a right given to him by law, to be heard before this tribunal. Although the bill has been filed in the State Court, yet the suit can not be said to be pending in that court, as the process has not been served, nor can notice be given, except by publication under the statute.

But if the process had been served, this Court, having jurisdiction of the equity, would not suspend the judgment on account of the proceedings in the State Court.

The United States v. Daniel J. Dickinson.

An injunction bill is not considered an original bill, and a service of the subpoena on the counsel of the plaintiff in the ejectment, will be a sufficient notice.

A question was made, whether the lessor of the plaintiff was entitled to a judgment, no notice to quit having been given by him to the defendant. But the Court held that notice, by the English rule, was necessary only in cases where the relation of landlord and tenant subsists, and that such relation does not subsist in this case.

The defendants claim as the assignees of a contract of purchase, and there was no agreement that their assignor should enter into the possession. In the case of *Spencer v. Marckle*, 2 Ohio Rep. 263, the Court held that the English rule, as to notice, is not adopted by the law of Ohio.

THE UNITED STATES vs. DANIEL J. DICKINSON.

The Court will not compel the Prosecuting Attorney to elect on which count in the indictment he will try the defendant, where there are different counts, charging offences of different grades, of the same class, and connected with the same transaction.

Offences are so varied in the different counts, as to agree with the evidence.

And no injustice is done, as the Court will always protect the rights of the defendant.

A defendant convicted of an infamous offence, if not sentenced, is a competent witness.

A witness is not obliged to answer a question which would show her or his character to be infamous.

The character of a witness must be impeached by general questions as to his truth.

On the crossexamination of a witness, a question irrelevant to the matter in issue can not be asked, to impeach him.

Nor can a witness be impeached by proving a statement different from the one sworn to, unless he has been examined as to his having made such statement.

Leading questions not proper, except on crossexamination.

The United States v. Daniel J. Dickinson.

The *Prosecuting Attorney* appeared for the plaintiffs, and Messrs. *Anthony* and *Swayne* for the defendant.

OPINION OF THE COURT.

THIS was an indictment for stealing letters and packets from the mail of the United States. The indictment contained nine counts, as follows: 1. For stealing the mail; 2. Stealing letters and packets out of the mail; 3. Stealing the mail, and opening it, and taking therefrom certain bank notes; 4. Stealing from the mail three certain letters containing bank notes; 5. For cutting the mailbag, with intent to steal, and take a letter therefrom; 6. For being present, aiding and assisting Charles Bostwick in stealing the mail; 7. For receiving certain bank notes, knowing them to have been stolen; 8. For concealing certain bank notes, knowing them to have been stolen from the mail; 9. For aiding Bostwick in concealing certain bank notes, knowing them to have been stolen from the mail.

After the defendant had pleaded not guilty, and before the jury were called, the counsel for the defendant moved that the District Attorney be required to make an election, on which count in the indictment he will rely for a conviction of the defendant; and English Crown Cases, 234, was cited in support of the motion. It was opposed by the District Attorney.

The principal ground on which an election by the Prosecuting Attorney is urged, is, that by including distinct offences in the same indictment, the defendant is restricted in his right of challenge. He may be willing to be tried by some of the jurors on some of the counts, but unwilling that they should pass upon others.

It is clear that offences of a different class, and which require different punishments, as murder and larceny, can not be joined in the same indictment.

In the case of *Young et al. v. The King*, in error, 3 Term Rep. 106, the Court held that it was no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts. The same principle was held in 2 M. & S. 379. Lord Kenyon remarked, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they might be joined in the same indictment.

In the case of *The Regina v. Strange*, 8 Carr. & Payne, 172, it was held that the offences of stabbing and cutting, with intent to murder, and with intent to maim and disable, although the judgment differs, being capital on the first count, and not on the others, they would not require the prosecutor to elect on which charge he will proceed.

It is no objection, in point of law, that an indictment charges prisoners, in one count, as principals in stealing, and, in another, as receivers; but, upon a case reserved, the Judges were divided in opinion, whether the prosecutor should have been put to his election, and directed that both charges should not, for the future, be put in the same indictment. *R. v. Galloway*, 1 Mood. C. C. 234. And a rule was subsequently adopted by the Judges, that, in a case like the above, the prosecutor should be put to his election. *Rex v. Flower*, 3 Carr. & Payne, 413. But this being a rule of practice, merely, is not received as an authority.

A count charging a person with being accessory before the fact, may be joined with a count charging him with being accessory after the fact, to the same felony; and the prosecutor can not be required to elect upon which he will proceed, as the party may be found guilty on both. *R. v. Blackstone*, 8 Carr. & Payne Rep. 43.

A receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although, in his discretion, the Judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts can not prejudice the defendant. *R. v. Austin*, 7 Carr. & Payne, 796. *R. v. Hartall*, Id. 475. *R. v. Wheeler*, Id. 170.

Although a prosecutor can not charge a defendant with different felonies, in different counts; yet he may charge the same felony in different ways, in several counts, in order to meet the facts of the case. Archbold's Crim. Pl. (ed. 1840) 56.

The first five counts in the indictment charge, substantially, the same offence, though taking a letter or packet which contains bank notes, as charged in the third and fourth counts, is punished by a higher penalty. In fact, the Court can not but know that all the counts in the indictment relate to the same transaction, and that the variation of the form in which the offence is charged, in the different counts, is done with a view to meet the evidence, and that they present only different grades of the same offence.

Should the jury convict the defendant under the third or fourth counts, it would virtually cover all the other counts. There could be but one punishment.

This subject must depend, in a great degree, on the exercise of a sound discretion by the Court. They will see that offences shall not be so joined, in the same indictment, as to deprive the defendant of any right which the law gives him. Experience shows the propriety, and, indeed, necessity of charging the offence in different ways, so as to meet the proof; and within the knowledge of the Court, no injustice has been done, under this practice, to defendants. And we think, that in a case like the present, great injustice would be done to the pub-

lic, by compelling the prosecuting attorney to make an election. The motion is, therefore, overruled.

The jury being sworn, in the course of the examination of the witnesses, Bostwick, who was the driver of the mailstage at the time the mail is charged to have been robbed, and who, having been indicted for the same at the present term, pleaded guilty, was offered as a witness by the prosecuting attorney; and the Court held that sentence not having been passed on him he was a competent witness. That the circumstances under which he was offered, could be used to impeach his credit. He was informed, however, by the Court, that he was not bound to state any fact which would criminate himself.

Eliza French was, also, called as a witness, and, while under examination, was asked a question which, if answered one way, would show her character to be infamous; and the Court informed her that she need not answer the question.

Witnesses were afterwards called to impeach her character, and on a question being asked whether she was not a lewd woman, the Court interposed, and said that the question must be restricted to her general character for veracity. (See ante p. 219, *The United States v. Vansickle*, and the authorities there cited.)

A question was then asked a witness whether Eliza French had not stated, in his hearing, certain facts, with the view of discrediting her evidence, by showing that such statement was materially different from the facts sworn to by her. This was objected to, and the Court sustained the objection, on the ground that as the witness, when under examination, had not been questioned as to such statement, it could not be proved to discredit her. That to lay the foundation for such evidence, Eliza French must have been asked, when under examination, whether she made such statement. *M'Kinney v. Neil*, 1 Mc'.

Lean's Rep. 547. 1 Phil. Ev. (edt. 1839) 293. 2 Brad. & Bing. 286, 315.

Eliza French was again called, without objection, and the question was asked her whether she had made a certain statement, repeating the substance of it, to an individual, naming him, which she answered in the negative. After this the impeaching evidence was heard.

And certain questions were asked of her, by the defendants' counsel, in regard to certain matters which, though they had a remote relation to the subject matter of inquiry, had no direct relevancy, with the view of contradicting her answers, to discredit her. This was objected to, and the Court sustained the objection.

Such questions must be relevant to the matter in issue. *Spencely v. de Willot*, 7 East. Rep. 10. If the answer were given on a collateral matter, no contradictory evidence could be heard. *Harris v. Tippet*, 2 Campb. Rep. 638. 1 Blackf. Rep. 86. *Ellmaker v. Buckley*, 10 Serg. & Rawle, Rep. 77. This question came distinctly before the Supreme Court, at the last term, in the case of *The Philadelphia and Trenton Railroad Company v. Stimpson*, 14 Peters Rep. 461, in which the Court said, "that a party has no right to crossexamine any witness except as to facts and circumstances connected with the matters stated in his direct examination."

A witness may be examined as to expressions or acts conducing to show a bias for or against either of the parties. Under this rule it might be proper to ask the witness, whether he did not prevent, or endeavor to prevent, the attendance of a witness, and whether he did not threaten to be revenged of one of the parties. This has no direct relevancy to the matters in issue, but it affects the credit of the witness, and, therefore, is admissible.

In the course of the examination an inquiry was submitted to the Court, as to the form of a question to be propounded to a witness in chief. The Court said it was extremely difficult, if not impracticable, to adopt any form which would be proper in all cases. The rule is, that a question shall not be so propounded to a witness as to indicate the answer desired. The form laid down in some of the books, "do you or do you not know," &c., is a leading question, and may be so emphasized as to indicate, in the strongest terms, the desired answer. It is a matter of no great difficulty, in every examination of a witness, by a general remark, to inform him on what points he is to be examined, and then to elicit his knowledge respecting them, by such questions as do not lead to the answer desired.

In the crossexamination leading questions are admissible on the ground that the witness, having been called by one party, may not be equally willing to disclose all he knows that shall be favorable to the other. And there may be circumstances, arising from the conduct of a witness, which shall require leading questions to be put to him, when examined as a witness in chief. This matter must depend upon the judgment of the Court.

Except the above, no questions of law were raised in the course of the trial; and it is not deemed necessary to state the facts which were submitted to the jury. The verdict was—"Not guilty."

Hall v. Warren and others.

HALL vs. WARREN AND OTHERS.

It is the duty of an officer of the customs, on making a seizure of goods, for having been imported in violation of the revenue laws, to institute proceedings in rem in the District Court.

The District Court has exclusive jurisdiction of forfeitures.

Whether the seizure has been rightful or tortious, cannot be ascertained until the matter has been adjudged by that Court.

If the person making the seizure refuse to proceed in the District Court, on application to the Court by the owner, he will be compelled to do so, or return the goods.

The pendency of the proceedings in rem may be pleaded in abatement, to an action of trespass against the officer.

Should the goods be adjudged to be returned by the Court, and a certificate of reasonable cause refused, it is final.

There can be no justification of the act of seizure, except on a judgment of condemnation, or a certificate of reasonable cause.

The officer making the seizure should examine the goods before it is made, and not make it unless there be reasonable cause. Where goods are taken from the possession of the owner, and detained, without reasonable cause, the officer is liable to damages to the full extent of the injury.

The circumstances may be proved in mitigation of damages, but not to excuse or justify the seizure.

Having possession of the goods, and exercising acts of ownership over them, the plaintiff may sue for a trespass on them in his own name.

Messrs. *Wright* and *Fox* appeared for the plaintiff, and Mr. *Hamer* for the defendants.

OPINION OF THE COURT.

THIS is an action of trespass brought by the plaintiff against the defendants for entering his store, in Cincinnati, by force, and removing therefrom, &c., a large amount of merchandize.

The defendants pleaded the general issue. They, also, pleaded specially, that the said goods were brought from some foreign port to the said defendants unknown; and that the defendant, Warren, being an officer of the customs, suspected said goods had been unladen and delivered in the vessel in

which they had been brought to the port of Cincinnati, without any permit or license from the collector, or any of the competent officers of the customs. And that the said goods did not correspond with the entry thereof, at the custom house; but were entered at a sum less than the actual costs thereof, with a design to evade the duties, &c.

And that the said Warren, calling to his assistance the other defendants, who were officers of the police, &c., seized the goods and removed them, as he had a right to do.

A notice was also annexed to the general issue stating the facts, substantially, as set out in the special pleas.

The plaintiff demurred to the special pleas. And the question arising on the demurrer, must be first considered by the Court.

Where a seizure of merchandize is made on suspicion of its having been illegally imported, it is the duty of the officer making the seizure to institute proceedings in rem in the District Court, or if the suspicion should prove to be unfounded to return the goods to the owner.

By the act of 24th September, 1789, exclusive original jurisdiction is given to the District Courts in all civil causes of admiralty and maritime jurisdiction, including seizures under laws of import, &c. And if the officer making the seizure shall refuse to institute the proper proceedings, on application of the aggrieved party, the Court will compel him to proceed to adjudication, or to abandon the seizure. *The brig Ann*, 9 Cranch Rep., 289.

This is not a case where the goods have been returned. The pleadings forbid such a supposition.

If the goods were imported in violation of law, they are liable to be forfeited; and the District Court only can enforce this forfeiture. And it is in view of this result that the proceeding against the goods is required. Whether the seizure

has been lawful or not cannot be known or ascertained, until the District Court shall have adjudicated on the subject.

And in the case of *Galston v. Hoyt*, 3 Wheat., Rep. 246, the Court remark, "the pendency of the suit in rem would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then in the former case by the general law, and in the latter case by the special enactment of the statute of the 25th April, 1810, Ch. 64, sec. 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal and a denial of such certificate, then the seizure is established conclusively to be tortious; and the party is entitled to his full damages for the injury."

That the certificate of condemnation, as also the certificate of acquittal is equally conclusive as to the character of the seizure is clearly established by the authorities. *Wilkins v. Despard*, 5 Term Rep. 112, 117. *Scott v. Shearman*, 2 W. Bl. 977. *Henshaw v. Pleasance*, 2 W. Bl. 1174. *Geyer v. Aquilar*, 7 Term, Rep. 681. *Slocum v. Mayberry et al.*, 2 Wheat. 1. *The Apollon*, 9 Wheat. Rep. 362.

The pleas do not state whether the proceeding in rem has been instituted, is pending, or has been terminated. And as the District Court is the only Court that has jurisdiction to adjudicate on the forfeiture, it clearly follows that until this adjudication is made, or a certificate of reasonable cause has been allowed, no plea of justification can be sustained. And this imposes no hardship on the officer making the seizure. He is not liable, during the pendency of the proceedings against the goods, to enforce a forfeiture. But his justification must alone rest on the decision of the District Court. And the pleas, in this respect, are, therefore, fatally defective. Without refer-

ence to the proceeding in rem, they set up a justification for the seizure, by alledging grounds of suspicion. And whether there were sufficient grounds or not this Court cannot try nor determine, but the District Court.

In defence, it is insisted that if the goods had been returned on examination, there being found no sufficient grounds to detain them, the grounds of suspicion may be pleaded as is done in this case. In the case supposed, it may be admitted that the grounds of suspicion might be given in evidence in mitigation of damages, but they could afford no justification. It is very clear they could not be pleaded as such. The demurrers to the pleas are sustained.

The jury being impaneled, the plaintiff proved that he occupied a store house on Pearl street, Cincinnati, in the summer of 1839; and that he had from fifty to sixty thousand dollars worth of worsted and other goods. That Warren, accompanied by the other defendants, came to his store and seized the goods, as having been brought into the country in violation of the revenue laws. The plaintiff denied the charge, and proposed, in the presence of several merchants, to unpack his cases and to exhibit all his goods for examination; alledging that on every article of goods chargeable with duty the duty had been paid, and he had evidence of the payment. And he offered to exhibit his papers and to procure the necessary assistance to open and examine his cases. But the defendant, Warren, declined all his propositions; said that he knew his duty and should execute it.

It was, also, proved that several merchants present advised the defendant, Warren, to have the goods examined, and admonished him that it was his duty to examine them. But he rejected their advice. Several of them proposed then to become the surety of the plaintiff to deliver the goods in the precise condition they then were the next day. But this proposi-

tion was also rejected, and Warren, the defendant, retained the possession of them through the night, in the storehouse, by his agents, and the next day removed them to a place of deposit where they were retained until the order for their restitution was made by the District Court.

The plaintiff, also, offered evidence conducing to prove that from the time the goods were thus taken, until they were restored, they had declined in price from twenty three to twenty five per cent. And that he was obliged to dispose of them at this or a greater loss. He, also, showed the expenses to which he was subjected, from previous engagements, of clerk hire, house rent, insurance, &c. And, also, the expense in attending to the suit in the District Court, and in prosecuting the present suit, with other items for moneys paid on the return of the goods, drayage, examiners, &c., &c.

The plaintiff, also, proved that the warrant, under which Warren acted in making the seizure, was obtained from a justice of the peace, on his own application and oath. And that he took possession both of the warrant and affidavit.

The record of the proceedings in rem, in the District Court, was given in evidence by the plaintiff, which showed that the return of the goods had been adjudged, and a certificate of reasonable cause for the seizure denied by the Court.

It appeared, also, in evidence, that the plaintiff was a citizen of England, and a stranger in Cincinnati, having but recently commenced business in that city. That he had made a very favorable impression upon the community, as a man of high and correct principles.

It was admitted that the defendant, Warren, was the surveyor of the port, at Cincinnati, and that on him devolved the duty to see that the revenue laws were not violated. And in his defence, he first offered a letter received from the Secretary of the Treasury, inclosing extracts from an anonymous letter,

purporting to have been written at Philadelphia, apprising him of contemplated frauds upon the revenue; and particularly informing him that a certain manufacturing house in Leeds, England, had made arrangements to export into this country large amounts of goods without paying the duties; and it was suggested that an importation had been made from the above house to Cincinnati, &c.

This evidence the Court remarked could not be received, either in excuse or justification of the defendant. But that it might be read for the single purpose of showing that the seizure had not been made from mere wantonness by the defendant; and that the jury might consider it, in connection with the claim of the plaintiff, for vindictive damages. That had this ground been abandoned by the plaintiff's counsel, the evidence would have been rejected.

The defendant, also, proved a conversation he had with one of the witnesses shortly before the seizure, respecting frauds upon the revenue, and in which he was advised by the witness to look into the establishment of the plaintiff. And the Court held that for the purpose of rebutting malice or any other improper motive in the proceeding, this might be received in evidence. That under this head the object was to show, by the defendant, that however illegal his acts may have been, they were prompted by an honest motive in the discharge of his duty.

And evidence was offered to prove that several of the other defendants were peace officers, and that they accompanied the defendant, at his request, with the view of preserving the peace.

But the Court rejected the evidence, saying that, in that transaction, as aiding and assisting the defendant, Warren, they must be considered as acting as citizens and not in the official stations which they might ordinarily fill in society.

In his answer to the libel, filed by the district attorney, in the District Court, the plaintiff stated the goods to belong to a certain firm of which he was one of the partners; and as this action is not brought in the name of the partnership, it was contended that the action could not be sustained. But the Court held that having the possession of the goods and exercising acts of ownership over them, the plaintiff might well sue in his own name. And that in addition to this consideration, it appeared that, by the District Court, the goods were adjudged to belong to the plaintiff; and they were ordered to be delivered to him as the rightful owner.

In the argument before the jury it was contended that, however illegally the defendant, Warren, may have acted in making the seizure, the other defendants, being citizens and having been called by him as an officer of the government to assist him in the performance of his duties, they cannot be held responsible for his errors.

The arguments being closed, the Court charged the jury that they had the right, as the evidence might require, to find any one or more of the defendants guilty or not guilty; and to assess, against him or them, the damages which the plaintiff has sustained by the seizure complained of. That the officer making the seizure had a right to call upon citizens to assist him in making it, and they are bound, under certain penalties, to render him assistance.

But this affords to them no justification if the proceeding of the officer be illegal. That their justification must depend upon the same ground as that of the officer making the seizure. And that, as in this case, the proper tribunal having decided the goods were not liable to seizure, and that there was no reasonable cause to authorize the proceeding by the officer, the other defendants could have no ground of justification. But the jury were instructed it would be for them to determine, from the

evidence, whether there was such a participation in the act of seizure, and the subsequent removal of the goods by the defendants, as would make them responsible for damages. The fact of their being present, as the friends of the officer, unless they aided and assisted him, or gave their advice and countenance to the trespass, they are not liable. They should not be found guilty unless there was such a participation on their part, if not by laying hold of the goods, by their presence and encouragement, as to have influenced, in some degree, the commission of the trespass.

That, as regards Warren, his duties are important to the public and to individuals, as the proceedings in this case show; and that they should be discharged with a due regard to private as well as to public rights. In so important a trust the action of the officer should always be governed by a sound discretion; and he should always solicit the best lights on the subject within his power.

That in entering the store of the plaintiff, after having made known his object, he should have proceeded, as the law requires, to examine the goods to ascertain whether the revenue laws had been violated. That the proposed co-operation of the plaintiff, to have his boxes opened and every piece of his goods examined, without delay, took from the defendant, Warren, every plausible pretext for removing them.

It appears, in fact, that a large part of the goods were not dutiable; but they, as well as those on which the duties had been paid, were seized, without examination, and removed by the defendant. The plaintiff, too, offered to produce evidence of the payment of the duties, and that the importation of the goods, as well in landing as in the invoices, was strictly in conformity to law. This conduct, on the part of the plaintiff, should have been met by the officer with a correspondent course of action on his part, which would have brought the

matter to a speedy determination. But, it seems from the evidence, that the defendant, so far from adopting this course, recommended by public policy, and a sense of justice to the government and to the individual, abruptly and insultingly rejected it. He asked no advice from the plaintiff or his friends, he said, and tauntingly observed, in the performance of his duties, would not be governed by their counsel. This would not have been objectionable, if the defendant had been careful to understand what his duties were, before he attempted to execute them. The counsel for the plaintiff insist, that he has not only shown an ignorance of the law under which he acted; but a wantonness which should subject him to exemplary damages. This, the Court remarked, they would leave for the consideration and determination of the jury.

That the plaintiff is entitled to damages, which shall compensate him for the injury he received, by reason of the trespass, is clear.

In ascertaining the amount of the damages the Court instructed the jury that they should take into their consideration the depreciation of the goods, the insurance on them, store rent, (having had to pay rent and insurance,) also, clerk hire, under permanent agreements; the expense of defending the goods in the proceedings before the District Court; and, also, in prosecuting this suit for damages; together with expenses paid by him in drayage, &c., on the return of the goods. That no damages could be recovered by the plaintiff, except those shown to have been incurred, prior to the commencement of the suit. The jury found for the plaintiff and assessed his damages at \$15,999 95. Judgment.

BANK OF CLEVELAND vs. STURGES ET AL.

A judgment was entered, 2d July, 1839, against Beebe, Vantine & Co., in this Court. On the 28th June, 1839, Vantine executed a mortgage on a certain tract of land to secure the payment of a debt due the complainant. The mortgage was filed with the recorder of the proper county for record the 2d July. Held that the judgment lien was paramount, as it took effect, from the first day of the term, which was the first of July.

Mr. *Turner* for the plaintiff, and Messrs. *Swayne* and *Bates* for the defendants.

OPINION OF THE COURT, BY JUDGE LEAVITT.

THE object of this bill is to obtain an injunction to stay a sale at law, on an execution issued from this court. The material facts, as stated in the bill, are as follows: On the 2d of July, being the second day of the July term of this court, in the year 1839, Sturges, Roe and Barker obtained a judgment against Beebe, Vantine & Co.; and an execution having issued on this judgment, certain real estate has been levied on, as the property of Vantine, which is about to be offered for sale by the marshal. The bill then asserts, in behalf of the Bank of Cleveland, a preferable lien on this real estate, in virtue of a mortgage, dated the 28th of June, 1839, executed by Vantine and wife, to secure the payment of a debt due to the bank from Vantine. This mortgage was filed for record, with the recorder for the county of Cuyahoga, on the 2d day of July following.

It is insisted, by the counsel for the bank, that these facts call for the interposition of the chancery powers of this court, in staying the sale on the judgment, in favor of Sturges, Roe and Barker. The ground on which this position is based is, that a mortgage creates a specific lien on the mortgaged prem-

ises, from the date of its execution, and imports a preferable lien to that created by a judgment rendered prior to the filing of the mortgage for record. And a number of cases are referred to, from which it appears that this is the settled law in some of the States of the Union. Chancellor Kent, in laying down the law on this subject, as established in the State of New York, 4 Com. 166, says—"a mortgage not registered has preference over a subsequent docketed judgment." And, again; "an unregistered mortgage is still a valid conveyance, and binds the estate, except against subsequent bona fide purchasers and mortgagees, whose conveyances are recorded." But he adds—"the rule in Pennsylvania is different, and the docketed judgment is preferred, and not unreasonably, for there is much good sense, as well as simplicity, in the proposition, that every incumbrance, whether it be a registered deed, or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of lien, upon the record which is open for public inspection." The only exception to the rule, thus approvingly referred to by the learned writer, is furnished in the case of a mortgage executed at the time of a conveyance of real estate to secure the payment of the purchase money. Under such circumstances the mortgage is properly preferred to a prior judgment.

The Statutes of Ohio, declaring the effect of judgments, on the real estate of the debtor, and providing for the registry of mortgages, as understood and construed by the Supreme Court of the State, seem fully to sustain the position, that liens on land, whether by judgment or mortgage, in the absence of fraud, are to be discharged according to the order of time in which they respectively attached. And this time is not left doubtful under the statutory enactments of the State, but is clearly and definitely fixed. The second section of the statute regulating judgments and executions, 3 Chase's Stat.

1709, declares that "the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term, at which such judgment shall be rendered." And the amendatory act, concerning the registry of mortgages, passed March 16, 1838, Ohio Stat. Vol. 36, p. 52, provides that "mortgages do and shall take effect, and have preference from the time the same are delivered to the recorder of the proper county, to be by him entered on record."

The judgments of this court create a lien on all the lands of the debtor within its territorial jurisdiction; and, under the provision of the statute just referred to, that lien attaches from the first day of the term at which judgment is entered. In the case before the Court the judgment became an effective lien on the real estate of Vantine, from the first day of July, 1839, that being the first day of the term at which it was obtained. The mortgage, though executed on the 28th of June, took effect from the 2d of July, the day on which it was deposited for record with the proper officer. The judgment, therefore, in point of time, has priority of the mortgage by the space of one day. And we think the rights of these parties must be determined in accordance with the principle embodied in the maxim, "qui est prior intempore, potior in jure."

This principle forms the basis of the decision of the Supreme Court of Ohio, in the case of *McGee v. Beatty and Bell*, 8 Ohio Rep. 396. The facts in that case were substantially as follows: McGee had recovered a judgment against Beatty, at a term of the Court of Common Pleas of Guernsey county, commencing on the 24th day of March. On the 27th of February, preceding, Beatty had executed a mortgage of the real estate in question, which was filed for record on the 14th of March, being ten days prior to the taking effect of the judgment. The judgment creditor filed a bill in chancery, asking the decree of

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the Court, postponing the lien of the mortgage, and for the sale of the land to satisfy the judgment. In their opinion, the Court say—"it is a case of two creditors contending for the priority of lien; and this priority must depend on the construction of the statutes relative to the subject." And, after an examination of the statutory provisions, the Court arrive at the conclusion that the mortgagee has the preferable lien, solely on the ground that his mortgage was filed for record, and, therefore, took effect before the rendition of the judgment. There is no reference to, or recognition of, the doctrine, that a mortgage imports a superior equity to that created by a judgment; and, therefore, that the latter, though prior in time, must be postponed to the mortgage. We can perceive no reason to doubt the correctness of this conclusion. The application for the injunction is therefore overruled.

LESSEE OF DUNN'S HEIRS VS. GAMES AND GILLET.

At the last term a judgment having been entered that the lessors of the plaintiff recover their term, &c., in the premises; on motion of Mr. Hamer, on behalf of defendants, a venire was issued to the marshal, under the occupying claimant law of the State, of 1831, directing him to summon a jury in the neighborhood of the land, and cause them to go upon it, examine witnesses, &c., and estimate the value of the improvements made by the tenants, the rents, waste, &c., and the value of the land in its natural state, in all things as the statute requires; and that return be made of their proceedings to the present term.

And at this term the marshal made return of the proceedings of the jury, under their hands, from which it appears that the permanent and valuable improvements amount to twelve hundred and fifty dollars; that the rents amount to the sum of five hundred and forty dollars; and that the land, in its natural state, is worth the sum of two thousand one hundred and ninety two dollars.

Mr. Hamer, in behalf of the defendants, moved the Court to set aside the proceedings of the jury:

First: Because they did not return their assessment, under their seals, as the statute requires;

Second: Because the jury assessed no damages for waste, nor have they returned that no waste was committed.

The statute requires the jury to return their assessment under their hands and seals; but in this return their seals are omitted. In every other respect the return conforms to the statute.

This statute is not made obligatory on this court by adoption under any act of Congress, but it is adopted as a fit and proper mode of proceeding by the Court. In every respect, however, this Court can not conform to the statute, as in the selection of jurors, &c. But the mode of proceeding is conformed to, so far as the organization and powers of this Court will permit. And whilst, of necessity, the forms of procedure are somewhat different, effect is given to the principles of the statute.

The return of the jury is under their hands, but their seals are not annexed, as the statute requires. This we do not think material under the rule of the Court. The objection does not go to the substance of the return, but to the form. And if this be sufficient to set aside the assessment, it will be impracticable for this Court to proceed under the statute. For this Court, as before remarked, have not the means of

carrying out the formal parts of the statute. We carry into effect the principles of the statute, and that is all we can do. On this ground, therefore, the return will not be set aside.

Nor will the assessment be set aside on the second ground. If waste had been committed the jury were required to assess the amount of damages. But they have made no assessment under this head, and the fair presumption is that no waste has been committed. It is somewhat singular that the defendants should object to the report on this ground.

The lessors of the plaintiff then, by Mr. Wright their attorney, gave notice, that they would relinquish the title to the land in favor of the defendants, on their paying to them its value, in its natural state, as assessed by the jury. And this option is given to the lessors by the statute. They may thus relinquish the land, or take out their writ of possession on paying to the tenants the excess of the improvements over the rents.

And the Court directed that the defendants should pay the assessment of the jury aforesaid, to the lessors of the plaintiff, within six months; and, in default thereof, that the writ of possession may issue.

A motion was then made that the costs of the inquest be taxed to the lessors of the plaintiff. But the Court held that the costs of this proceeding follows the judgment. Had a judgment been entered against the lessors of the plaintiff for the improvements, as the statute authorizes, the costs of the inquest might have been taxed in that judgment.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1841.

BENEDICT ET AL. *vs.* ADMINISTRATORS OF DAVIS.

If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it

But this holding out must be such as to justify an inference that the creditor had knowledge of it. Or the representation of partnership must be made to him.

A declaration by an individual that he was a partner, to some four or five individuals, of which the creditor, when he trusted the firm, could have had no knowledge, will not constitute a liability.

To rebut such declarations, as conducing to establish a partnership in fact, the contract made between the parties, though by parol, may be proved.

A court will not grant a new trial, unless the rules of law, and purposes of justice, require it.

Mr. *Niles* appeared for the plaintiffs, and Mr. *Bradley* for the defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants to recover from them, as the representatives of Davis, a partner in the house of Allison & Co. The jury found for the defendants, and a motion for a new trial was made on the following grounds:

First: The jury should have been instructed that Davis, having held himself as a partner to the world, was liable as such.

Second: Evidence was given to the jury in regard to the contract between Davis and the Allison's, which should have been excluded.

Third: The weight of the evidence was in favor of the plaintiffs.

Among other evidence conducing to show a partnership between Davis and the Allison's, several witnesses stated that the former represented himself to them, both before and after the purchase of the goods, for the price of which this action was brought, as a partner. And it is insisted that, on this ground alone, he is chargeable as a partner. That where an individual holds himself out as a partner he is liable as such, though, in fact, he had no interest in the partnership concern.

The doctrine of partnership, though pretty well defined, does not seem, on some points, to have been settled on sound principles. It is laid down that if an individual, as a compensation for his labor, agrees to receive a part of the profits, he will be liable as a partner; and yet if he is to receive a certain sum of money in proportion to a given quantum of the profits, he is not so liable. Now, although this is the established doctrine, in the language of Lord Eldon, in reason, it would seem to be impossible to say, that, as to third persons, they are not equally partners. *Ex parte Rowlandson*, 1 Rose, 89. *Ex parte Watson*, 10 Ves. 461.

Where a person lends his name to a partnership, though, in fact, he has no interest in it, he is liable as a partner. And this rule is founded upon general policy. *Waugh v. Carver*, 2 H. Bl. 235. Gow on Part. 23.

To create responsibility, as a nominal partner, the allowed use of the name on bills of parcels used by the firm seems to be sufficient, notwithstanding that the creditor was originally ignorant of the introduction of the name. Gow. 23. *Young v. Axtell*, 1 Esp. N. P. C. 29. 1 Serg. and Rawle, 338.

In the case under consideration the declarations of Davis, in regard to his being a partner, as proved, were made at, and in the neighborhood of, Laport, in Indiana, to residents of that place; the bills were not made out against Davis as a partner, nor was there any evidence conducing to prove that the plaintiffs had any knowledge that he represented himself to be a partner, or, that the plaintiffs, who are citizens of New York, gave credit to the Allison on his account. And it is important to inquire whether, from this state of facts, he can be held responsible as a partner.

The counsel for the plaintiffs earnestly contends that Davis is liable on the above evidence, though it be, in fact clear, that he had no partnership interest. That this liability does not depend on the credit given by the plaintiffs to him at the time the goods were sold, nor on their having a knowledge of his having held himself out as a partner, but upon the fact of his having so represented himself.

In this view of the case, if there be a liability it arises from general policy, that an individual shall be held bound where, by holding himself out to the world as a partner, he has given the influence of his name to the firm. That a contrary doctrine would enable an individual to practice a fraud upon all who gave credit to the firm.

Before a reference is made to adjudged cases on this point, it may be proper to remark, that it is difficult to perceive how a fraud can have been practiced on the plaintiffs, if, at the time they sold the goods, they had no knowledge of Davis, as being connected with the firm, or, as representing himself to be connected with it. It is clear that, under such circumstances, his name or credit could not have operated on the plaintiffs, or in any way influenced their conduct. Such a fraud seems to be too refined for legal comprehension or action.

It may be readily admitted that positive proof of knowledge of the above facts, by the plaintiffs, is not necessary to establish the liability of Davis; but such facts must be proved as to authorize the jury to infer this knowledge. This inference might well be drawn from the fact, that the name of Davis was published as a partner in a newspaper, or inserted in a sign over the door of the house in which the goods were kept and sold, or that the bills were made out against him as a partner. But not one of these facts are proved in this case.

In the case of *Vice v. Lady Anson*, 7 Barn. and Cres. 409, Lord Tenterden said—the plaintiff, at the time when he supplied the goods, did not know that the defendant either had, or thought she had, any interest in the mine. He did not, therefore, supply the goods on her credit. The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion in private letters and society that she was interested, might be prima facie evidence that she had an interest; but the other facts in the case show that she had not any interest. This case is more fully reported in 3 Car. and Payne, 19; and, also, the decision of the Court in Bank on a motion to set aside the nonsuit which was overruled.

In the case of *Dickinson v. Valpy*, 10 Barn. and Cres. Rep. 128, Mr. Justice Park said—if it could have been proved that the defendant had held himself out to be a partner, not “to the world,” for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner.

In Chitty on Bills, (edt. 1839) 43, it is said, if a person represent himself to be a partner, though, in fact, he was not so, and thereby induce a person to give credit to a concern, he will be liable as a partner; but the representation must be by himself, or by some third person by his authority; and it must be general and public, or to the particular creditor, for a representation only to one or more persons which the creditor never heard of, could not mislead him, and he has no right to avail himself of it, in order to fix a party, who, in fact, was not a partner. These authorities show that, independently of the proof of the fact of partnership, there was no such holding out by Davis to the public, or to the plaintiffs, as to make him liable as a partner, and that the Court did not mistake the law in their charge to the jury.

The motion for a new trial can not be granted on the second ground. The complaint here is, that illegal evidence was admitted to show the contract between Davis and the Allison, in regard to his advance to them of five hundred dollars, the amount of which he was to receive in goods at cost.

This evidence was introduced by the defendants to rebut and explain the evidence of a partnership given by the plaintiffs. The terms of the contract were repeated by the parties in the presence of the witness, before one of the Allison, who purchased the goods, left Laport for that purpose.

Now, it is true this contract was made without the knowledge of the plaintiffs, but, in this respect, it stands upon the same footing as the evidence to prove a partnership. And as they had no knowledge of the one, they can complain of no surprise as to the other. In every view the evidence to prove this contract was legal. Whether it was fraudulently entered into or not, was a matter for the jury.

That the weight of evidence, as to the proof of partnership, was with the plaintiffs, must be admitted. At least this

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is my view on the subject. But the preponderance is not such as to authorize the Court to set aside the verdict and give a new trial. To authorize this it is not enough that the Court differ, in their opinion of the evidence, from the jury. There was some impeachment of two or three of the witnesses, from the facts proved, and the circumstances of the case. The jury had the facts fully before them, and gave such weight to the witnesses as they believed them to be entitled to. Under all the circumstances we are not convinced that the rules of law, and the purposes of justice, require a new trial, and the motion is overruled.

THE UNITED STATES vs. BOICE.

On a note given to an agent of the United States, for their benefit, suit may be brought in their name.

Mr. *Pettit*, District Attorney of the United States, appeared for the plaintiff, and Messrs. *Lockwood* and *Gregory* for the defendant.

OPINION OF THE COURT, BY JUDGE HOLMAN.

THIS is an action of debt for three promissory notes, made by the defendant, payable to Levi Woodbury, Secretary of the United States Treasury, or to his successors in office.

The suit is in the name of the United States. The declaration states that the defendant made the notes, and delivered them to the plaintiffs, and thereby promised to pay said plaintiffs, by the name and description of Levi Woodbury, Secretary of

the United States Treasury, or to his successors in office, and alledges a failure to pay in the usual form.

To this declaration the defendant has demurred, on the ground that the suit should have been in the name of Levi Woodbury, and that the United States can not maintain an action in their own name upon these notes.

It is not pretended that the notes are not the property of the United States, nor that the money due on them is, in fact, due to the United States; but that no action can be maintained on them but in the name of Levi Woodbury, the nominal payee, or his successor in office, or his representatives.

The form in which the interest of the United States in the notes is alledged in the declaration, is unimportant. The question presented by the demurrer for the consideration of the Court, is, can the United States maintain an action on the notes in their own name?

Taking it, then, for granted that the United States alone are entitled to the money due on these notes, there can be no question but that they can maintain an action for it in their own name.

Without any reference to the various cases where a principal may sue in his own name, on a contract made in the name of his agent, the Court is satisfied that the positions taken by the Supreme Court, in the case of *Dugan v. The United States*, 3 Wheat. 173, clearly establish the right of the United States to maintain this action. That was a case where a bill of exchange had been indorsed to Thomas T. Tucker, Esq., Treasurer of the United States, or order. It had been indorsed by him to another, but came back to his hands, in consequence of a protest for nonpayment; and a suit was instituted on it against a prior indorser, in the name of the United States. And, on a special verdict finding all the facts, the Court deter-

mined that the action was well brought, and that the United States had a right to sue and recover in their own name.

“If,” say the Court in their opinion, “it be generally true that, where a bill is indorsed to the agent of another for the use of his principal, an action can not be maintained in the name of such principal, (on which point no opinion is given,) the Government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject matter of the controversy.” In the case before the Court, the allegations in the declaration clearly show that the United States alone are interested in the subject matter of this action, and, consequently, they have a right to maintain the action in their own name.

“There is,” say the Court, in the case here cited, “a fitness that the public, by its own officers, should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light, when weighed against those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but setoffs may be interposed against the individual who is plaintiff, unless the Court will take notice of the interest of the United States; and, if they can do this to prevent a setoff, which courts of law have done, why not at once permit an action to be instituted in the name of the United States?” The reasoning in this case is so clear, and the doctrine established so conducive to public justice, without imposing any hardship on public debtors, that, independently of its authoritative character, as the supreme law of the land, the Court do not hesitate to decide this case in accordance with its principles; though the cause of action in this case is not the

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same, in terms, that it was in that, and the interest of the United States does not appear in the same way. There it appeared in a special verdict, here by the averments in the declaration: yet the interest here, for the purposes of settling the right of action, is as unquestionable as it was there; and, therefore, this action is clearly maintainable in the name of the United States. Demurrer overruled.

SAMUEL BISPHAM vs. TAYLOR AND OTHERS.

Where the defendant may replevy the judgment, and suspend the execution for six months, a declaration against the Marshal and his sureties, which avers that he neglected to make the money, is defective.

In such a case the Marshal is not required, absolutely, to make the money.

He must make it, unless the judgment shall be replevied. The declaration must negative every presumption of duty on his part.

On the replevy bond the Marshal is required to take one or more sufficient freehold security.

Freehold surety, therefore, must be taken, or the Marshal will be liable.

If the sureties be not freeholders, however ample they may be considered by the Marshal and the public, the Marshal is responsible on their failure.

In this respect, the statute must be pursued, and, by examining the records, the Marshal may ascertain the sufficiency of the sureties offered.

To make this examination, would not impose on the Marshal an unreasonable diligence.

An averment in the declaration that the Marshal took insolvent sureties, and not freeholders, sufficient to charge him.

Mr. *Butler* and Mr. *Morrison* appeared for the plaintiff, and Messrs. *Smith* and *Bright* for the defendants.

OPINION OF THE COURT.

THIS action is brought on the bond given by the defendant Taylor, as Marshal, and signed by the other defendants, as his

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sureties. The condition of the bond, was, that he would well and faithfully discharge his duties as Marshal, &c.

The first count in the declaration, after stating the appointment of Taylor as Marshal for the District of Indiana, and the giving of the bond for the faithful discharge of his duties, sets out the obtainment of a judgment by the plaintiff, &c., against Lemuel Pollock, for the sum of seven hundred and three dollars and forty cents, with costs. That the judgment remaining unpaid and in full force, the 29th May, 1839, the plaintiff issued a fieri facias, directed to the Marshal aforesaid, commanding him, &c., returnable the first Monday in August ensuing; that, on the execution, the clerk indorsed the same was repleviable, at the time it was issued; which writ was delivered to the Marshal in due time; and that, although there was then, and afterwards, at all times before, and until the return day of the writ, divers goods and chattels, lands and tenements of the said Pollock, within the district, whereof the said Taylor, as such Marshal, could and might and ought to have made the money so commanded to be made in and by the said writ, of which he had notice; yet he, not regarding the duties of his office as Marshal, but contriving, and wrongfully and unjustly intending to injure, &c., the said plaintiff, &c., did not, nor would, at any time before the return of said writ, according to the mandate thereof, cause to be made the said sum of money, in said writ named, &c., but neglected and refused, &c., to wit: on the 5th August, 1839, falsely and deceitfully returned the said writ, &c.

The second count stated the judgment and execution, &c., as in the first count; averred that the Marshal, not regarding his duty, wilfully, fraudulently and unlawfully, suffered and permitted the said Pollock to replevy and stay execution upon the judgment, for the term of six months, from and after the date thereof, and accepting from the said Pollock a certain

pretended replevy bond, which he then and there offered and tendered to the said Taylor, as Marshal, aforesaid, with James T. Pollock and James Murry, as his securities, in the penalty of fourteen hundred dollars, made payable to the said plaintiff conditioned for the payment of the full amount demanded by the said last mentioned writ, together with the interest and costs, &c., at or before the expiration of six months from, &c., which, said writ, was returned the 5th August, 1839. By which proceeding, the execution upon the judgment was stayed, &c. And the plaintiff, in fact, says that said James T. Pollock and James Murry, at the time of the said taking of the said replevy bond by the said Taylor, Marshal, &c., were not, nor have they since been, nor are they now, sufficient freehold securities for the purpose of replevying said judgment; but, on the contrary, they and each of them were, and ever since then have been, and still are, wholly insolvent, &c.

The defendants filed a general demurrer.

This replevy bond was taken by the Marshal under the 14th section of the act of Indiana, entitled An act to subject real and personal estate to execution, approved February 1, 1831; which provides that the officer, issuing the execution, shall indorse thereon—repleviable; and the defendant may replevy the same, by tendering to the officer, having such execution in his hands, a bond with one or more sufficient freehold securities, made payable to the execution plaintiff, in a penalty of at least double the amount demanded by such execution, &c.

This bond, from its date, has the form and effect of a judgment, and is required to be recorded by the clerk.

The first count in the declaration is, clearly, bad. The Marshal was not bound, absolutely, to make the money, and the count is framed upon the hypothesis that he was so bound. He was required to make the money on the execution, unless the defendant replevied it under the statute cited. Now it

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does not appear, from the first count, but that a replevy bond was given, which would postpone the execution, and all action on the judgment, for six months. And this is not a matter of defence, merely, but of averment in the declaration. The law gave the right to the defendant to replevy; and to take this bond, and suspend all action on the execution, became as much the duty of the Marshal as to make the money, if no bond was tendered.

Suppose the execution, upon its face, commanded the Marshal to make the money or take the replevy bond, or to make the money, unless the replevy bond should be tendered by the defendant, would an action lie against the Marshal without averring, in the alternative, that he had neither made the money nor taken the bond? Either would satisfy the execution, and, consequently, to show a neglect of duty by the Marshal, the one alternative, as well as the other, must be negatived.

The 14th section of the statute being binding, is as much a part of the execution, as if its provisions were incorporated in it. And in this, as in every other action founded upon the nonfeasance or misfeasance of a public officer, the declaration must show the right of the plaintiff, and the liability of the defendant.

It is insisted that the second count is, also, substantially defective; that it is not sufficiently averred in it—

First: That the original judgment remains unsatisfied;

Second: That the replevy bond has not been paid;

Third: That the sureties in the bond are insufficient;

Fourth: Nor that the Marshal had notice of the insufficiency or insolvency of the security.

There is no ground for the first and second objections, above stated. The second count, after alledging the material facts in the case, avers that, by reason of which said premises, the said Samuel Bispham has been, and is, wholly deprived of the

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benefit of the said last mentioned writ and of his said judgment, and of the power and means of collecting the money due thereon, &c.

This negatives any presumption of payment, either of the original judgment, or the replevy bond. In fact, the demand is the same on both, and the payment of either would satisfy the plaintiff. The averment would be untrue, if the plaintiff had received the amount of the replevy bond, for that would be a payment of the judgment.

Nor does there seem to be any ground for the third objection to the averment, of the insufficiency of the sureties. The averment is in the words of the statute, that the said James T. Pollock and James Murry, at the time of signing the bond, were not, nor have they since been, nor are they now, sufficient freehold securities, &c.; that they were, and ever since have been, wholly insolvent.

It is not perceived how the averment, in this respect, could have been more full than it is.

Was it necessary, as insisted in the fourth objection, for the plaintiff to aver that the Marshal had notice of the insufficiency of the securities?

Under this head, it is contended that the Marshal was not bound to warrant the sufficiency of the sureties in the bond; that, if he acted in good faith in receiving those who were apparently sufficient, having no knowledge to the contrary, he is excused.

To sustain this position, the decision in the case of *Hindle v. Blades*, 5 Taun. Rep. 225, is cited.

That was an action against the sheriff for taking irresponsible sureties on a replevin. The statute of the 2 G. 2, ch. 19, sec. 23, required the sheriff to take two responsible persons. And, it was contended, that it was incumbent on the sheriff to select sufficient sureties. The case of *Saunders v. Darling et al.*,

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Bul. N. P. 60, where the Court say, in such action against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof upon the sheriff; for the sureties are known to him, and he is to take care they are sufficient.

Mansfield, Chief Justice, said, "I can not think the statute meant to throw on the sheriff this onus. Suppose the sheriff had taken an eminent banker, as surety, a week before his bankruptcy, when no one in the world had the slightest reason to suspect his circumstances. According to the same doctrine, the sheriff would have been liable for taking him as surety." And Mr. Justice Dallas said: "The question is, whether the sheriff, who is bound to take two responsible sureties, has not done so? He makes proper inquiries, and finds that these are considered as responsible persons. Is not this sufficient? It can not be that the sheriff should be bound to know that which nobody else knows; and, if the rest of the world trust the surety, it is a sufficient justification to the sheriff."

In the case of *Scott v. Waithman*, 3 Stark. Rep. 168, Chief Justice Abbott said: "The principal question is, as to the responsibility of Maberly. He assented to the law, as stated, that the sheriff was justified in taking a person, as surety, who appeared to the world to be a person of responsibility; but that, if he actually knew that the party was not responsible; or if, having the means in his power of informing himself upon the subject, he neglected to use them then, notwithstanding appearances, he took the consequences upon himself, and was responsible in the event of the insufficiency of the surety."

It would seem from the above cases that, under the British statute, if the sheriff uses the means in his power to ascertain the sufficiency of the sureties, (and they are so generally esteemed,) he is not responsible for their performance. And this, perhaps, is the correct rule on the subject. But, if the sheriff

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have a knowledge of any facts which should create suspicion of their sufficiency; or, if he neglect to make the necessary inquiries, he will be held liable.

The Indiana statute is, in one respect, materially different from the British statute. By the former, the Marshal is required to take one or more sufficient freehold securities. The surety, then, must be a freeholder; and, if the Marshal take a man who is not a freeholder, and he shall become insolvent, the Marshal will not be exonerated, however sufficient the surety might have been held at the time.

As land titles are required to be recorded, it is in the power of the Marshal generally, if not universally, by examining the proper record, to ascertain who are freeholders, and what liens exist on the real property of the persons offered as sureties. Indeed, it would seem that, by such an examination, it is always in the power of the Marshal to take sufficient sureties. The bond, itself, operates as a judgment, and, of course, creates a lien on the real estate of the sureties. To require this examination, would not require from the Marshal greater diligence than the rule laid down by Chief Justice Abbott. But, however this may be, it is very clear that it was not necessary for the plaintiff to aver, in his declaration, that the Marshal had notice of the insufficiency of the sureties, as contended.

As the second count in the declaration is held to be good, the demurrer must be overruled.

On motion, leave given defendants to plead.

Sperring and Laforgue v. Taylor et al.

SPERRING AND LAFORGUE vs. TAYLOR et al.

In a declaration on a Marshal's bond, it is not necessary to aver that the penalty has not been paid.

The usual averment of the breach of the condition is sufficient.

Mr. *Morrison* appeared for the plaintiffs, and Messrs. *Smith* and *Bright* for the defendants.

OPINION OF THE COURT.

THE pleadings in this action are similar to those in the preceding case, and this suit is founded on the Marshal's bond as in that one. It is unnecessary to review the points already considered and decided, but there is one new point raised in this case which will be examined.

It is objected to the declaration that it contains no averment that the penalty of the bond has not been paid.

Was this averment necessary?

This bond is taken in a large penalty to secure those who shall be injured through the default or negligence of the Marshal. No one is entitled to recover on this bond more than an indemnity for the injury sustained. And every individual who suffers from the failure of duty by the Marshal, has an equal right to sue on this bond. No one is entitled to recover the penalty, unless he shall show that he has suffered damages to that amount.

It is true that the sureties on the bond cannot be compelled to pay more than the penalty. But they cannot discharge themselves by paying the amount of the penalty to any one, who shall recover on the bond a sum less than the penalty. So soon as the sureties shall pay to those who shall be entitled to it, a sum equal to the penalty in their bond, they may set

Metcalf v. Robinson.

up the fact as matter of defence, or it may, perhaps, be examined on motion that they be discharged.

But it is not necessary, in bringing suit on a bond like this, to aver in the declaration the nonpayment of the penalty. An averment of the breach of the condition is sufficient. This principle was recognized in the case of *The State of Indiana on the relation of Merrill v. McClung and others*, 2 Black. Rep. 192.

METCALF vs. ROBINSON.

A declaration in debt on simple contract is bad, if it alledge the defendant promised to pay. The word agreed, instead of promised, should be used.

The action of debt is founded upon the contract.

The action of assumpsit on the promise. And this is the principal distinction between the two actions.

Though the declaration, in other respects, have the form of debt, yet if it alledge a promise, it has the form of assumpsit and not of debt.

Messrs. *M'Kinney* and *Gookins* appeared for the plaintiff, and Mr. *Lockwood* for the defendant.

OPINION OF THE COURT.

This action was brought on a bill of exchange, for \$627 33, drawn by the plaintiff on the defendant, accepted by him and protested for nonpayment.

The first count of the declaration complains, &c., of a plea that the defendant render unto the plaintiff one thousand dollars, which he owes and unjustly detains from him. For that whereas, &c., setting out the bill, its acceptance and protest

for nonpayment. And that the plaintiff, as drawer, was forced and obliged to pay the holder, &c., of which the defendant had notice, "by means whereof said defendant then and there became liable to pay said plaintiff said sums of money; and being so liable, he, the said defendant, then and there undertook and promised to pay," &c.

The second count states that the defendant was indebted to the plaintiff for so much money, &c., had and received to and for the use of the plaintiff at defendant's request. And, also, in the further sum of seven hundred dollars for money laid out and expended, &c.; and being so indebted, he, the said defendant, in consideration thereof, then and there undertook and promised to pay to the said plaintiff said sums of money, when he, the said defendant, should be thereunto requested. Yet the said defendant has refused, &c., to the damage of the said plaintiff two hundred dollars.

To this declaration the defendant demurred, and assigned as cause of demurrer a misjoinder, the first count being in debt and the other in assumpsit.

The forms of a declaration in an action of indebitatus assumpsit, and in debt on simple contract are very similar. There are, however, certain words by which they are distinguished, and which give the one or the other character to the action. The action of debt is founded upon the contract, the action of assumpsit upon the promise, and in this consists the principal distinction between the two actions.

In the action of debt, on simple contract, express or implied, the subject matter of the debt should be described precisely as in the common counts in assumpsit. The consideration for the contract must be stated, as also any inducement necessary to explain the contract or consideration, and it should be stated the party agreed to pay. Stating that he promised to do so

would be bad. *Emery v. Fell*, 2 Term, Rep. 28. 2 Bos. & Pul. 78.

In the case of *Brill v. Neele*, 3 Barr. & Ald. Rep. 208, the record stated, that the plaintiff had brought his bill, &c., in a plea of debt, and the commencement of the declaration was in the common form in debt. The first count then stated, that defendant was indebted to the plaintiff for work and labor, &c., and, being indebted, that the defendant undertook and promised to pay upon request, &c. The second count was upon a quantum meruit, and in form like the first. The other counts were properly framed in debt. To this declaration there was a demurrer, assigning for cause the misjoinder of debt and assumpsit. In support of the demurrer the case of *Dalton v. Smith*, 2 Smith, Rep. 618, was cited, where the Court held a declaration containing counts precisely similar to be bad; and Lawrence, Justice, there said, that the counts laid with a promise were counts in assumpsit without a breach.

There can be no doubt, that in the case under consideration, the counts were intended to be in debt. This is plainly seen from the general form and language of the counts. The damages are laid at the conclusion of the declaration, as in debt, in a less amount than the sum demanded. But in both counts it is alledged that the defendant, "in consideration thereof, undertook and promised to pay." This, under the above authority, makes the counts assumpsit. They are counts in assumpsit without a breach. The breach assigned in the last count, which lays the damages at two hundred dollars, when the amount demanded is the sum of one thousand dollars, is wholly irregular. Leave given to the plaintiff to amend his declaration.

Welldes v. J. W. and S. Edsell.

WELDDDES vs. J. W. AND S. EDSSELL.

Where defendants, by the misrepresentation of their agent, procured the deputy clerk to receive an assignment of a judgment, and depreciated paper, in payment of a judgment, for which he gave a receipt, the plaintiffs are not bound by it, and may issue their execution.

Such an arrangement being wholly unauthorized by the plaintiffs, the Court will not set aside the execution.

Nor will the Court enter a rule on the clerk to pay over the paper received by his deputy, the clerk never having sanctioned the arrangement.

The clerk is bound by the acts of his deputy, but where the act is not in the ordinary course of business, and, especially, where it has been done through the procurement and misrepresentations of a party, the liability of the clerk may be doubtful.

Under such circumstances the Court will not give to the party a summary mode of redress.

Mr. *Lockwood* appeared for the plaintiff, and Mr. *Cooper* for the defendants.

OPINION OF THE COURT.

Samuel Edsell, one of the defendants, filed an affidavit stating that, at November Term, 1838, the plaintiffs, citizens of New York, obtained a judgment against them for \$1,198 84, and that the defendants paid on the judgment \$824 48, by the assignment of a judgment in the defendants favor, against Roe-hill & Spencer, to and for the plaintiffs, and that on the 4th January, 1839, they paid to the clerk of this Court \$416 00, and, also, \$8 40 costs on said judgment. That the amount of the judgment assigned had been paid to the plaintiff's attorney, and that the money paid to the clerk was equivalent to specie, as he is informed and believes, and that the clerk gave to defendants a receipt in full for the judgment. That notwithstanding said payment execution has been issued on the judgment, and is now in the hands of the marshal. And the defendants, by their counsel, move the Court to set aside the execution.

The receipt of the deputy clerk was produced as above, and he, being sworn, states that the agent of the defendants, from

whom he received the above assignment of the judgment and payment, and to whom the receipt was given, informed him that the plaintiffs' counsel had agreed to receive the judgment assigned and the payment of Indiana paper, in discharge of the judgment against the defendants, and relying upon this statement he made the arrangement with the defendant's agent.

The counsel for the plaintiffs, being sworn, states that, he made no such arrangement as above represented with the defendants or their agent. That the money on the assigned judgment is in his hands, subject to the order of the defendants. It has not been applied on the judgment against them, because the defendants refused to have it so applied, unless the counsel would agree, also, to sanction the above payment, in paper, to the deputy clerk.

On this state of facts the Court refused to set aside the execution.

The deputy clerk, in making the arrangement, was misled by the statement of the defendant's agent, and the plaintiffs ought not to be prejudiced by it.

As the plaintiffs demanded specie from the defendants, and as the above arrangement avoided the payment of specie, it seems to have been intended to defeat the plaintiffs' demand. The arrangement was, in fact made, without authority, and, under the circumstances, we think, the plaintiffs are entitled to their execution.

At a subsequent day of the term a motion was made for a rule on the clerk to pay over the money received by his deputy to the defendants, and the merits of the motion were discussed as though the rule had been granted.

On a motion of this kind the Court will not consider the question which has been raised as to the power of the clerk to receive the amount of a judgment on his docket, and give a discharge against it. It has been usual to make such payments,

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and this is enough to fix the liability of the clerk under ordinary circumstances. And had this payment been made in money the Court would not hesitate to enter the rule.

But this cannot be considered a bona fide payment on the part of the defendants. From the time the arrangement was made known to the clerk he refused to sanction it. And the deputy had no special authority to make it. It was not, in fact, in the line of his ordinary duty as deputy. Suppose he had executed a receipt to the defendants without receiving a dollar of the money, would the clerk have been bound? He did, in fact, execute a receipt without receiving money. The assignment of the judgment the deputy had no authority to take, nor had he a right to receive the Indiana paper which he did receive.

If an agent act within the line of his duty he binds his principal; but if he exceed his powers he does not bind him. The custom of an office, under the general sanction of its head, would bind him. Whatever is done, generally, by a deputy clerk may be presumed to be done with the sanction of the clerk; and, under such circumstances, no secret agreement or understanding, between the clerk and his deputy, can relieve the clerk from responsibility. But where a thing is done, as in the present case, out of the ordinary course of business, and, especially, where this deviation has been through the procurement and misrepresentation of the party or his agent, the liability of the clerk may be considered doubtful. If the act of the deputy were procured through the fraud of the defendants, it is clear that the clerk cannot be held liable.

But we deem it unnecessary, on this motion, to decide this question. Whether the clerk is liable or not, for the Indiana paper received by his deputy, we are clearly of the opinion that under the circumstances the defendants are not entitled to this summary relief.

Foote and Bowler v. E. and O. Brown.

FOOTE AND BOWLER vs. E. AND O. BROWN.

To charge the guarantor of a note or bill, he must have notice of demand and nonpayment.

And this, whether the name of the guarantor be upon the bill or not.

Where his name is on the bill strict notice is required, but where it is not, reasonable notice is sufficient.

Where a note is received, the proceeds to be collected and applied by the creditor to the discharge of his debt, he is bound to use due diligence to collect the note, and to give notice of nonpayment.

Messrs. *Fletcher, Butler* and *Yandis* appeared for the plaintiffs, and Mr. *Price* for the defendants.

OPINION OF THE COURT.

THIS action is brought on a guaranty, by the defendants, of a note given to the plaintiffs, by Daniel Brown. The Declaration contained three counts: First: On a promissory note. Second: On an agreement to pay on condition. Third: A general count for money had and received, &c. To the first and third counts nonassumpsit was pleaded. To the second the defendants demurred, on the ground that it contains no allegation of notice to defendants of demand and nonpayment of the note by Daniel Brown.

The defendants, also, filed two pleas of setoff in the form of "special payments," under the practice act of Indiana, of 1838. The pleas were, that certain drafts for money had been given defendants, on a house in New Orleans; that defendants left the same with H. and H., of that city, for collection, and took their receipt for them. That afterwards defendants assigned the receipt to the plaintiffs, who receipted for it, agreeing to collect and apply the money to defendants' account.

That the plaintiffs had given no notice that the house, who held the drafts, had refused to deliver them to the plaintiffs, or,

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that the drafts had not been paid, &c. Demurrers were filed to these pleas.

On the part of the plaintiffs it is contended that, as the names of the defendants were not on the note guaranteed, they were not entitled to notice. That to avoid their guaranty they must show that they have sustained damage for want of notice. That the principal had property when the note became due, so that they could have secured themselves from loss, if notice had been given.

Mr. Chitty, in his Treatise on Bills, page 324, says—"in these cases of collateral guaranties, where the parties' names are not on the bill, they are not entitled to the strict and immediate notice of dishonor, as a party is who has drawn and indorsed the bill, and unless he has really sustained loss by the want of notice, he continues liable on his guaranty." *War-rantington v. Furber*, 8 East. 242. 6 Esp. Rep. 89. Chitt. on Bills, 365—"a person who has guaranteed the due payment of a bill, may, in some cases, be released from the responsibility by the neglect of the holder duly to present it for payment, if he can show that he was thereby prejudiced." And, again, page 441—"in general, if the bill or note be given as a collateral security, and the party delivering it were no party to it, either by indorsing or transferring it by delivery, when payable to bearer, but merely cause it to be drawn or indorsed, or, delivered over by a third person as a security, or, has guaranteed the payment, it has been considered that he is not, within the custom of merchants, an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liability by the neglect of the holder to give him such notice, unless he can show, by express evidence, or by inference, that he has actually sustained loss or damage by the omission." *Philips v. Astling*, 2 Taunt. 206. *Swinyard v. Bowes*, 5 Maule and Sel. 62. *Holbrow v. Wilkins*, 1 Barn.

and Cres. 10. 2 D. and Ry. 59. *Van Wert v. Woolley*, 3 Barn. and Cres. 439. These authorities are somewhat questioned in the case of *Camidge v. Allenby*, 6 Barn. and Cres. 373. 9 D. and Ry. 391. In page 497, Mr. Chitty says—"it is expedient, though not in general absolutely necessary, to give notice to a person who has guarantied the payment of the bill."

Whatever doubt may exist in England, under their decisions, whether notice is necessary to charge a guarantor, whose name does not appear on the note, there can be none under the decisions of the Supreme Court.

In the case of *Douglass and others v. Reynolds and others*, 7 Peters, 126, the doctrine is clearly laid down. That was a continuing guaranty to Reynolds & Co., as indorser, &c., for one Haring. And the Court say—"the fourth instruction insists that a demand of payment should have been made of Haring, and in case of nonpayment by him, that notice of such demand and nonpayment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guaranty." "And we are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of the law, the guarantors are only collaterally liable on the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part, to perform his engagements, are indispensable to constitute a *casus foederis*."

This notice need not be given with as much strictness as to charge a party whose name is on the bill, but it must be given in a reasonable time. See the case of *Lewis v. Brewster*, in this vol. page 21. The principle may be laid down as generally applicable to commercial paper, that where the undertaking is collateral to pay the debt of another, on his default, a notice of demand and nonpayment is necessary. And this

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whether the name of the party be on the dishonored note or not. The only difference in principle seems to be that where the individual is a party to the note strict notice is required, but where he is not a party reasonable notice is sufficient.

This view is decisive of this case, as there is in the declaration no averment of a demand of payment and notice to the defendants; but a remark or two may be made on the pleas which are demurred to.

These pleas are filed under a special statute of Indiana. Where negotiable paper is given as conditional payment, the proceeds to be collected by the holder, and applied in payment of the debt, it is incumbent on the holder to use due diligence in collecting the money, by making a demand when it becomes due, and in giving notice of nonpayment to those whose names are on the paper. If, in this respect, the holder is guilty of laches, so as to release the parties on the bill, he makes the paper his own, and must sustain the loss.

In *Camidge v. Allenby*, 6 Barn. and Cres. 373, above cited, where, in payment for goods sold, certain notes on a country bank were delivered, which bank, unknown to the parties, had stopped payment at an earlier hour on the same day, and no notice for one week was given to the person who paid the notes, it was held that there were laches which released him from responsibility. Mr. Justice Bailey remarked—"the rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them."

An agent to save himself from responsibility must observe the usual course of transacting the business in which he is engaged. If he procure an insurance, and neglect to have inserted in the policy the common and usual clauses in the

like policies, and a loss should occur, which would have been covered by such clauses, the agent would be responsible for the loss. *Mallough v. Barber*, 4 Camp. R. 150. 6 Taunt, 495. If the agent deposit the money of the principal in his own name, and on his own account, and the bank fail, the agent would be responsible. *Massey v. Banner*, 1 Jac. and Walk. 245, 248. And so if an agent sell the goods of his principal on credit contrary to usage, or fail to demand the money when the credit had expired; or, if he should sell to persons of doubtful credit, or actually insolvent, he is responsible. Story on Agency, 189. And if he give time for payment after the money became due, or should omit to use the common diligence to collect it, the loss would be his own. *Caffrey v. Darby*, 6 Ves. 494, 495.

In the case under consideration, if the plaintiffs, having possession of the drafts, neglected to make the proper demand when they became due, or to give notice, so as to hold liable the parties to the drafts, in case of nonpayment, through which the recourse of the defendants was cut off, the loss must fall on the plaintiffs. Under the circumstances the plaintiffs were bound to do what the law required, to collect the money on the drafts, and, in case of failure, to notify all persons concerned. But, as the case turns upon the demurrer to the second count, the question arising on the pleas need not be decided. Demurrer to the second count is sustained. The plaintiffs abandoned their claim under the other counts.

Lewis Curtis v. Administrators of Bowrie.

LEWIS CURTIS vs. ADMINISTRATORS OF BOWRIE.

By statute in Indiana the representatives of a deceased joint obligor may be sued, as on a joint and several obligation.

A declaration which alleges a promise by the deceased to pay, and, also, a promise by his administrators, though informal, is not bad on general demurrer.

It is apparent, from the whole declaration, that the defendants are charged in their representative character, and not in their own right. And this is substantially good.

Mr. Cooper appeared for the plaintiff, and Mr.——— for the defendants.

OPINION OF THE COURT, BY JUDGE HOLMAN.

THE declaration in this case states that John B. Bowrie, in his lifetime, together with John Peltin, made their promissory note to Booran & Co., whereby they promised to pay the said Booran & Co. the sum of eleven hundred and sixty one dollars and eighty six cents, and, also, the current rate of exchange, &c., and that the note was indorsed by Booran & Co. to the plaintiff, that before the payment of the note Bowrie departed this life, and that the defendants were duly appointed administrators of his estate, whereby they became liable to pay said note to the plaintiff, and that, being so liable, they promised to pay, &c.

To this declaration the defendants have demurred generally.

The first cause of demurrer alledged, is, that the note is made jointly by Peltin and Bowrie, and that neither Bowrie nor his administrators could be sued on it without joining Peltin in the action. That this objection would be fatal to the action at common law is unquestionable. A suit could not be maintained against one of two joint obligors. The suit must be against both. It is, however, otherwise, where

the note is joint and several, either is liable to the action as if the note was made by him alone. And the Legislature of this State, in the Revised Code of 1838, page 358, have enacted "that the representatives of one jointly bound with another for the payment of a debt, &c., and dying in the lifetime of the latter, may be charged by virtue of such obligation in the same manner as such representatives might have been charged if such obligors had been bound severally as well as jointly." There can be no doubt but that the Legislature, by these provisions, have placed joint obligations on the same footing with obligations that are joint and several, in actions like the present, and that this objection is untenable.

It is, also, urged that the declaration is insufficient, because it alleges a promise to pay by Bowrie in his lifetime, and, also, a promise by his administrators after his decease, leaving it doubtful, whether the plaintiff intends to charge the defendants in their own right, or in their representative character.

The promissory note is the foundation of the action. The declaration alleges the promise of the decedent, and an obligation resting on him, by virtue of his making said note. The promise alleged to be made by the defendants after they become the administrators of the decedent's estate, is mere form, and can not charge them in their individual character. They are only charged in the declaration in their representative character, and if judgment goes against them it must be according to the tenor of the whole declaration against the estate of their intestate, as there is nothing in the declaration that would render them liable in their own right.

We think the declaration is sufficient, and that the demurrer can not be sustained.

Bowman's Devises and Burnley v. Wathen and others.

BOWMAN'S DEVISEES AND BURNLEY vs. WATHEN AND OTHERS.

All persons whose interests will be affected by the decree should be made parties, if within the jurisdiction of the Court. And, in that case, the want of jurisdiction over them should be stated.

Where the proper parties are not made the Court will, generally, suspend the decree, and direct that proper parties be made.

That persons are unnecessarily made defendants does not oust the jurisdiction as to those who are properly before the Court.

An objection, that some of the plaintiffs have no interest, can not be made at the hearing.

By the common law land held adversely can not be conveyed.

The rights of a proprietor, bounded by a navigable river, extends to high water mark; if the river be unnavigable, to the middle of the stream.

By the common law rivers are only navigable as high as the tide ebbs and flows; this not so in this country.

The riparian right is protected as any other right.

The right to apply for a ferry license attaches to the riparian proprietor, and this can not be taken from him and given to another without compensation.

In principle it is the same right which the land holder has to the soil, or, to any benefit appurtenant to the soil.

The relief will be given in equity, if it be not complete at law.

The owner of land bounded by a navigable river may convey the soil, excepting the right of ferry.

The difference between a reservation and an exception in a grant.

The part excepted is not conveyed, but remains in the grantor, and needs no words of perpetuity.

The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as a rent or an advowson.

In such a case the grantee has a right to use the soil for ferryways, but for no other purpose.

And for any obstruction of this right he is entitled to a remedy.

A ferry right, by the laws of Indiana, may be assigned.

The statute of limitations in Indiana does not run against nonresidents.

But the complainants may be barred by lapse of time.

Bowman's right of ferry was reserved, or excepted out of the grant made in 1802.

A license to keep a ferry, adverse to Bowman's right, was obtained the same year; and Wathen, the defendant, is proprietor of that and two other ferry rights, equally adverse to Bowman's. And the ferry has been kept up from the time it was first granted.

Bowman lived in Virginia, but his agent, who executed the conveyance, resided in Louisville, in sight of the ferry, and often crossed in it.

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A notice to the agent is notice to the principal.

This adverse ferry was in operation twenty four years before the decease of Bowman, and twelve years after his decease before this bill was filed.

The right asserted by the complainants was of a nature to require peculiar vigilance.

And not having taken any step to assert their right, until the filing of this bill, they are barred by the lapse of time.

This cause was argued by Messrs. *Brown* and *Switzer* for the complainants, and Mr. *Stevens* for the respondents.

OPINION OF THE COURT.

THE complainants claim a ferry right from Jeffersonville, in Indiana, across the Ohio river to Louisville, in Kentucky, which is in the possession and enjoyment of the defendant, Wathen, who claims one half of it, and which the complainants pray, in pursuance of their right, may be decreed to them.

The complainants, except Burnley, claim as devisees of Isaac Bowman, and he claims as their assignee. Bowman was attached to the regiment commanded by George Rogers Clark, and to whom the State of Virginia granted one hundred and fifty thousand acres of land, lying northwest of the river Ohio. In the cession of lands to the United States, north of the Ohio river, by the State of Virginia, this tract was reserved. It was located on the Ohio river, at the falls, and includes the city of Jeffersonville. Commissioners were appointed by Virginia, and authorized to allot and convey to the officers and soldiers of the above regiment, according to their respective rights, the above tract. To Bowman was conveyed five hundred acres, on a part of which Jeffersonville now stands.

Bowman was a citizen of Virginia, and, it seems, was never in the Territory or State of Indiana. On the 8th of March, 1802, he empowered John Gwathney "to lay off into a town, in any manner he may think proper, one hundred and fifty acres of the above tract, and vest all right and title in discreet persons as trustees of said town. And the attorney was

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authorized to sell lots, &c., convey to the trustees two acres for a public square, &c., and to do and transact all and any kind of business which may be necessary to carry into effect the foregoing powers."

On the 22d day of June, 1802, the plan of the town being made, the attorney conveyed to M. G. Clark and others, trustees of the town, and their successors in office, one hundred and fifty acres, described by metes and bounds, under certain reservations and conditions, among which were the following: "That the said Isaac Bowman shall have, and use for, and in his own behalf, whatever right he may now hold as proprietor, to the establishment of one or more ferries."

On the plan of the town northeast of Front street, on the river, was left an open space which was marked as commons.

On the 12th October, 1802, William H. Harrison, governor of the Indiana Territory, granted a license to M. G. Clark, one of the grantees in the above deed, a license to keep a ferry at the town. And on the 2d July, 1807, he granted a license to one Joseph Bowman, also, to keep a ferry at the same place.

In 1820 the Legislature of Indiana sanctioned the ferry right to George White, originally granted to him.

Bowman continued to reside in Virginia until his decease, in 1826. He devised his real estate, in Virginia, Kentucky, and Indiana, in connection with which this ferry right was named, to his children in certain divisions. Under the will the complainants named as devisees took the lands in Indiana, including the ferry right. One of the children of the deceased is still a minor, and they have all continued to reside in Virginia.

On the 11th May, 1839, the devisees, for the consideration named, of twenty thousand dollars, conveyed the ferry right, and the lands, &c., in Indiana and Kentucky, devised to them by their father, to their co-complainant, Burnley.

The three ferries, granted as above stated, are now consolidated into one, and the defendant, Wathen, by conveyances from the original grantees, and those who claimed under them, is vested with one half of the interest of the ferry. The persons who own the other half are citizens of Kentucky, and can not be made parties to the suit; and this is assigned, in the bill, as a reason why they are not made parties.

From the answer of Wathen, it would seem that the ferry, by the loss of ferryboats, steamengines, &c., has been unprofitable until last year. Various grounds of defence are alledged in his answer, and, also, in the answer of the Mayor and common council of the city of Jeffersonville, which will be hereafter considered.

In the commencement of the argument the complainants' counsel notify the Court, and the respondents' counsel, that, on the present bill, they shall claim the ferry right only. Indeed, this is distinctly avowed in the bill.

It is objected by the respondents' counsel that, by uniting the devisees of Bowman and Burnley as complainants, there is a misjoinder which must be fatal to the right asserted in the present form of proceeding.

The objection is not that there is a want of proper parties, but that Burnley having received a conveyance, by deed, of all the interest of the devisees of Bowman to the right in controversy, the devisees are not necessary parties. There are cases in which a want of proper parties may be alledged at the hearing. All necessary parties must be before the Court, unless it be shown, in the bill, that they are not within the jurisdiction of the Court. And although the Court will not dismiss a bill which is defective in this respect, they will suspend the decree, and direct the cause to stand over to bring in the proper parties. *Milligan v. Milligan*, 3 Cranch's Rep. 320. In the case of *Carneal et al. v. Banks*, 10 Wheat. Rep. 181,

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the Court held—"the circumstance that some have been improperly joined as defendants in the bill, can not affect the jurisdiction of the Circuit Court as to other parties who are properly before it."

And in *Wilkinson v. Parry*, 4 Russ. Rep. 272, it was decided that an objection that some of the plaintiffs have no interest can not be made at the hearing.

It must be observed that the right asserted in the bill, whether asserted by Burnley or his co-complainants, the devisees of Bowman is the same right. Burnley, it is true, claims under a deed, but from the facts stated in the pleading, it would seem that, at the time this deed was executed, there was possession of the land conveyed to which this ferry right is appurtenant. And if, as the defendant's counsel insists, this possession was adverse, the deed to Burnley conveyed no title.

It is believed that in Indiana there is no statute which prohibits the sale of pretended titles. But the statute of 27 Hen. 8, was in affirmance of the common law. And in C. Litt. 369, it is laid down, if a person out of possession convey land which is held adversely, the conveyance is void. 9 John. Rep. 55. *Partridge v. Strange*, Plowd. 77. *Tite v. Doe*, 1 Black. Rep. 127.

Now, although the mere ferry right, which is an incorporeal hereditament, may not be capable of an adverse possession within this principle, except as appurtenant to the land; yet the state of the title was such as to render it prudent, and, as we think, proper, to make the devisees of Bowman co-complainants with Burnley. And there are considerations, independently of this, arising out of the election of the devisees, under the will of their ancestor, as to this ferry right, and other facts connected with their title, which make them necessary parties. But, if this were not the case, the Court would

permit the complainants, even at the hearing, to strike out the names of the devisees, if necessary to the exercise of jurisdiction. Such an amendment of the bill could not take the respondents by surprize, or subject them to any change in their defence. But if the deed to Burnley be inoperative as a conveyance of the title, the devisees of Bowman would be indispensable parties. If Burnley can set up only an equity, it is necessary for him to make those from whom he claimed such equity parties to the suit. *Findlay and others v. Hinde et al.* 1 Peters' Rep. 241. 1 McLean's Rep., *Smith v. Shone*, 31.

We think that the objection of a misjoinder, as made by the defendants, can not avail them.

The rights of riparian proprietors are so well defined, and have been so fully investigated by the Supreme Court, that little need now be said to show their nature and extent. In the cases of *The City of Cincinnati v. the Lessee of White*, 6 Peters' 431. *Barclay and others v. Howell's Lessee*, 1b. 498, and *The Mayor, &c., of New Orleans v. The United States*, 10 Peters' 662, the doctrine is examined.

Where land is bounded by a watercourse these rights attach to the proprietor. And it is immaterial whether the watercourse be a navigable river or a smaller stream; or, whether the proprietor be a corporation or a natural person.

In the case of *Tyler v. Wilkinson*, 4 Mason. C. C. Rep. 397, Mr. Justice Story says—"prima facie, every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle-thread of the stream." The Judge is here speaking of a river which is not navigable, and such is undoubtedly the common law. In the case of the Royal Fishery, in the river Banne, Davies' Rep. 152, 155, 157, it was resolved, that by the rules and authorities of the common law, every river, where the sea does not ebb and flow, was an inland river not navigable, and belonged to the

owners of the adjoining soil. The same doctrine is found in *Carter v. Murcat*, 4 Burr. Rep. 2162, and in *The King v. Wharton*, 12 Mad. 510. And Sir Matthew Hale, in his *Treatise de jure Maris, &c.* Hargrave's Law Tracts lays down the law, generally, that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil; but he admits that such rivers may be under a servitude to the public, and regarded as common highways. This doctrine is fully recognized by Chief Justice Kent, in the case of *Palmer v. Mulligan*, 3 Caine's Rep. 318.

We apprehend that the common law doctrine, as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide. Where a stream, which is clearly not navigable, forms the boundaries of proprietors on each side of it, under the common law, each may claim to the middle of the stream. But this right can not be exercised to the injury of other rights of the same nature. On navigable streams the riparian right, we suppose, can not extend, generally, beyond high water mark. For certain purposes, such as the erection of wharfs, and other structures, for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit. But, in the present case, this inquiry is not important. It is enough to know, that the riparian right on the Ohio river extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained, without the consent of the proprietor. He has the right of fishery, of ferry, and every other right which is properly appurtenant to the soil. And he holds every one of these rights by as sacred a tenure, as he holds the land from which they emanate. The State can not, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the

power, to appropriate private property for public purposes. And any act of the State, short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative and void. It can afford no justification to the grantee against an action of trespass.

In coming to this conclusion, we have deemed it unnecessary to look particularly into the laws of Virginia, under which the title in question was derived; to the compact between Virginia and the other States, at the cession of the territory northwest of the Ohio, or to the Ordinance of 1787. The principles laid down are of common right. In this country they are every where recognized. They belong as well to the civil, as the common law.

The title of Isaac Bowman was derived from the State of Virginia, not only before Indiana was known as a Territory, but before the organization of the Northwestern Territory. His rights, whatever they were, can have been, in no respect, affected by the direct action of the Territorial Government, or of the State Government, which succeeded it.

Where a State grants land, it may impose any restrictions, which shall be deemed proper, on the grantee. But where the grant is without restriction, as in the present case, the grantee holds the land, and all the appurtenances which belong to it. Some of the rights which appertain to the soil are of a public nature, and the use of them are, consequently, subjects of legal control. Of this character is the right of ferry, the right of wharfage, and others which might be enumerated. Any man has a right to keep ferry boats, for his own convenience, upon his own land. But he is under no obligation to afford any amount of accommodation to the public. And, for this, the Government is not only authorized, but bound, to make suitable provision. On this ground, licenses to keep ferries are granted,

and the grantees are bound to keep suitable boats, give the requisite attention, and, in all other respects, to comply with the requirements of law. In Indiana, and in many other States, the grantee of a ferry is required to give bond and security, for the performance of his duties. His charges are also regulated by law.

To protect the grantee in his rights, and remunerate him for the money expended, and the responsibilities incurred, no other person, without a license, is permitted to set up a rival ferry, which shall lessen the profits of the first one. Nor, indeed, can the State consistently, if at all, grant a new ferry, to the material prejudice of an old one, unless the public accommodation shall require it.

The Legislature of Indiana have not assumed the right to grant a ferry license, except to the proprietors of lands on the borders of rivers, &c. In 1807 a law to this effect was passed, authorizing the Court of Common Pleas to make the grant. In 1815 a law authorized the County Courts to establish ferries on the Ohio river, under the above restriction, and required bond to be given, &c. And, in 1817, the Board of County Commissioners were empowered to grant licenses, for ferries, to the proprietors of lands on the margin of a river, &c. The third section of this act provided, "that when the land on the margin of a river should be a public common of a town, that the Board of Commissioners might grant a ferry license to any proprietor of land next adjoining the said public common." But, at the same session, a supplemental act was passed, declaring "that nothing in the said 3d section should affect the right of any town or corporation, or the right of any person, proprietor of any town, by reason of any grant of ferry license to a person who was not a proprietor of land on the margin of the river."

By these acts, the Legislature of the State of Indiana has fully recognized the ferry right of the proprietor on the margin

of the river, as above stated. And, indeed, the act of 1817, declares that such right shall not be prejudiced by the grant of a ferry license to one who is not a proprietor of lands adjoining the river.

In the argument, it was supposed that the recognition of this principle would operate most injuriously to the public—that it would be in the power of any proprietor to prevent the establishment of a ferry upon his land; but, it will be observed, that the same principle applies to the establishment of public roads, canals, and almost every description of public improvement. No man's property can be taken, for these purposes, against his will, unless compensation be made. And this is the rule in regard to ferry ways. These, no more than the other real estate of the proprietor can be taken without his consent, unless they shall be taken, and paid for, under the power of appropriation.

The respondent's counsel insists that, if the legal right of the complainant, Burnley, be as stated in the bill, he has full and adequate relief at law. There can be no doubt that, where an injury is done to an established ferry, an action at law would be the appropriate mode of redress. But that is not the case made in the bill. What redress can an action at law give to the complainants, should the right, asserted, be sustained? The defendant, Wathen, under color of right, at least, is in possession of the ferry. He claims under the original grantees, and in virtue of a right which has been exercised and sanctioned by public authority nearly forty years. This right has the proprietorship of the soil to support it. The claim in the bill is hostile to this, and, if sustained, must rest upon the reservation in the deed of Bowman, by his attorney, to the original trustees of the town. And, on this ground, the exclusive ferry right, appurtenant to the hundred and fifty acres, is asserted. Since 1802, this right has been dormant. For aught that appeared

to the public, or to the owners of the different ferries established at Jeffersonville, it had been abandoned. Under such circumstances, it was the duty of the public authority to provide for the general accommodation. This was done; and we think, under the circumstances, was rightfully done. And now that this dormant ferry right is set up, if its validity be admitted, how can effect be given to it? Not, certainly, by an action at law. This can neither enjoin the defendants, nor transfer their receipts, nor their ferry rights, to the complainants. And, if relief be given, it must be in one of the modes here stated. It is, therefore, clear that the remedy is not at law.

A great number of other questions are made in the answer, and by the defendant's counsel, in argument, more or less important; but they will be passed over, and the great questions in the cause will be considered: and these are, the nature and extent of the ferry right reserved by Bowman, and the lapse of time.

This deed was executed by Gwathney, the agent of Bowman. On looking into his authority, which is in writing, and in evidence, there can be no doubt he possessed the power to make the deed. And now we will consider the reservation or exception, as it is called, in the deed.

As this is an important point in the case, it may be proper to advert to such parts of the deed as can have any bearing on the question under consideration.

The deed conveys to certain persons, named as trustees of the town of Jeffersonville, "and to their successors in office, to the use, interest and purposes, hereinafter expressed, and to and for no other use, interest or purpose, whatever, that is to say: the said John Gwathney, as attorney, in fact, for the said Isaac Bowman, shall have, retain, possess and exercise, the sole, entire and exclusive right and privilege, of making applications of the moneys arising from the sale of the lots of the said town;

and shall, also, have and use, for and in behalf of the said Isaac Bowman, whatever right he may now hold as proprietor to the establishment of one or more ferries." The deed then states the boundary of the one hundred and fifty acres, beginning at a stake on the bank of the Ohio river; running thence up the river, and binding thereon, &c. To have and to hold the before-mentioned tract, or parcel of land, under the conditions, limitations, reservations and restrictions, before mentioned, and the said public square aforesaid, for the purposes aforesaid, to the said trustees, and their successors in office, forever. Then follows the clause of warranty.

In the body of the deed is stated that the attorney had laid off the one hundred and fifty acres in a town, and drawn a plan of it, designating two acres of ground as a public square, with convenient streets and commons, and called it Jeffersonville.

These are all the parts of the deed which can have any supposed bearing upon the reservation of the right in question.

From the trustees, Bowman received a conveyance for lots 190, 191 and 192, which are bounded on the river, and which were retained by him and passed to his devisees, who have conveyed the same to the complainant Burnley. The title to these lots, however, is, in no respect, connected with the ferry right under consideration.

From Front street, to the upper limit of the town, an open space is left, between Water street and the river, which, on the plan of the town, is called Commons. On these commons is the landing and ferry ways of the defendants.

There can be no doubt that this designation, on the plan of the town, and, also, the two acres for a Public Square in the centre, taken in connection with the deed of Bowman to the original trustees, which deed and plan were recorded, constituted a dedication of the square and the commons to the public.

That the trustees could have no succession, they not being incorporated, is no objection to this view. The trustees, or, at least some of them, are believed to be still living. To the purchasers of lots they conveyed titles, as they undoubtedly had the power to do.

No act of dedication could be more formal, or more solemn, than the deed and the plat in this case. And, if any confirmation were necessary, the use of the commons and of the public square for thirty eight years, as such, may be referred to. This public use would, of itself, be evidence of a dedication. On the fact of dedication, there can be no doubt.

It is insisted that the reservation of the ferry right, being inconsistent with the grant, is void. But is it inconsistent with the grant?

The commons extended from Water street to the river, and the fee to this space, by the dedication, as completely passed out of Bowman and vested in the public, for the use declared, as if the most formal conveyance had been executed. But, in addition to this, the fee was actually conveyed to the original trustees. The town, then, when it became incorporated, and, indeed, before, was entitled to the use of these commons to the water. But that this use is not at all inconsistent with the use of the commons for a ferry landing, is shown by the fact that they have, from the first, been used as such.

The defendants' counsel suggests, that this ferry right can only subsist in connection with the soil. It is a right connected with the soil, and grows out of it, the same in principle as an advowson or rent. It is an incorporeal hereditament, and lies in grant. Coke, 335, b. When the ownership of it is not connected with the ownership of the soil no one can have seizin of it as of land. But, still, it is classed with real estate, and is subject to the laws which govern the realty. And so is rent, or an advowson.

An advowson appendant may become in gross, by various means. 1. If the manor, to which it is appendant, is conveyed away in fee simple, excepting the advowson; 2. If the advowson is conveyed away without the manor, to which it is appendant; 3. If the proprietor of an advowson appendant, presents to it as an advowson in gross. Dyer, 108. Cruise's Di. 3, vol. 4. The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea and abstracted contemplation, it is not capable of corporeal seizin or possession. Cruise's Di. 5.

A person having free warren over certain lands, may alien them, reserving the warren. Dyer, 30, 6 Pl. 209. A rent may be reserved upon a grant of an estate in remainder or reversion; for, though the grantee can not distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession. 1 Inst. 47, a.

Rent may be reserved on a conveyance of lands in fee simple, and this is called a fee farm rent.

The statute of Indiana recognizes the right of the proprietors of lands on the margin of the river, and to none others can ferry rights be granted; and, it is supposed, that this limits the right to the grantee of the soil. But this construction of the statute can not be sustained.

By the statute, nothing more could have been intended than to rescue, from violation, the right of the riparian proprietor. This right is appurtenant to the soil; but he may convey it, and still retain the fee in the land. And, by such conveyance, the grantee holds the right which the statute was designed to protect. He has the use of the soil for a ferry landing, and for ferry ways, so far as the public accommodation is concerned, as fully and completely as could be exercised by the grantee of the soil; but for no other purpose has he a right to enter upon

the soil. Now, it must be perceived, that the right thus possessed, is as much within the policy of the statute, as if it were a fee simple in the soil. Indeed, it is within the letter of the statute. For the grantee of such a right may, in the strictest sense, be considered, for all the purposes of the ferry, "the proprietor of land on the margin of the river."

This right, as before remarked, is real estate. It descends to heirs, as such, is subject to dower, and to all the incidents of real property.

We come now to consider the operative words of the reservation.

"And [the attorney] shall also have and use, for and in behalf of the said Jacob Bowman, whatever right he may now hold as proprietor, to the establishment of one or more ferries."

That this reservation gave to Bowman, during his life, this ferry right, there can be no doubt. We have shown that it may be separated from the fee in the soil, and still be within the policy and language of the statute. But Bowman is now deceased, and the inquiry is, was the right reserved to his heirs?

It is admitted that the word heirs is not necessary, in every possible case, in a reservation or grant, to give an estate of inheritance.

If the father infeoff the son, to have and to hold to him, and to his heirs, and the son infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple. Coke on Lit. 501. When the act of disposal relates to another thing, that thing becomes, in a manner, part of the disposition, and, in such case, the mind is carried to the idea of an heir, as clearly as if the word "heir" had been inserted in the feoffment. 3 Bac. Abr. 534.

Where a man, seized of land in fee, made a lease for years, reserving rent to him and his assigns *during the term*, it was adjudged that this reservation should not determine by the

death of the lessor, but the rent should go to the heir. *Sock-
everell v. Fraggett*, 2 Saund. 367. Hargr. n. 8, 47, a. *Sury
v. Brown*, Latch. 99, 100. Ventr. 163. 2 Lev. 13.

If one coparcener or joint tenant releases all his right to another, it will pass a fee without the word heirs. So if one coparcener grants a rent to the other, for equality of partition, an estate in fee simple in the rent will pass without the word heirs; for, as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word heirs had been used. 1 Inst. 10. 4 Cruise's Di. 295.

But these are exceptions to the general rule, and the cases put can admit of no doubt as to the intention of the parties. We will now cite cases where the word heirs, in reservations, has been held necessary to constitute an estate in fee simple.

If a rent be reserved to the lessor and his assigns, it will determine at his death; for the reservation is good only during his life. So, if a rent is reserved to him and his executors, he having the freehold it will be determined at his death; because the reversion to which the rent is incident descends to the heir. 1 Inst. 47, a. 1 Ventr. 161. 3 Cruise's Di. 319.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons or the like, and express or limit no estate, the lessee or grantee hath an estate for life only. Dyer 300.

A reservation sometimes operates as a grant, but this cannot be the case with an exception.

An exception, says S. Touch. 77, is where the grantor excepts something out of that which he has before granted, by which means it does not pass by the grant, and is reserved from the things granted. "And note," says Lord Coke on Litt. 412, "a diversity between an exception, which is ever a part of the thing granted and of a thing in esse, for which exceptio salvo, præter, and the like, be apt words; and a reservation

which is always of a thing not in esse but newly created or reserved out of the land or tenement demised. *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam ratinet semper cum ea est et semper fuit.*"

Here Coke states that a reservation is always of something not in esse; but the inaccuracy of this is shown in his own words in a different section. "Reserve," he says, "cometh of the latin word *reservo*, that is to provide for store; as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometimes it hath the force of saving or excepting. So, as sometime, it serveth to reserve a new thing, viz—a rent, and sometime to except part of the thing in esse that is granted." 143, a.

The words exception and reservation are used synonymously in grants, and have the same effect. The effect of the deed does not depend upon the use of the one or the other of these terms, but on the facts which they represent.

In the case of *Greenleaf's lessee v. Birth*, 6 Peters Rep. 310, the Court say in order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is within the exception is excluded from the grant.

Suppose, in conveying to the trustees the one hundred and fifty acres, the attorney of Bowman had excepted, from the operation of the deed, any given number of lots, as designated on the plan of the town, would these lots have passed by the deed? Being excepted, out of the land conveyed, they could not have passed. They would then have remained in Bowman, unaffected by the deed. Of this, it is supposed, no one can doubt. And the only inquiry now is, whether the ferry right reserved is of the same nature, in this respect, as a part of the land. In what does it differ? It is appurtenant to the soil, and constitutes no inconsiderable part of its value. As has been shown it is susceptible of a different ownership from the

soil. It is still a right growing out of the soil, and subjects it to the servitude in whosever hands it may come. Although an incorporeal hereditament, in contemplation of law, it is property, real property. It passes by deed—is assets in the hands of heirs, and, in all respects, is subject to the laws which regulate real estate.

It is readily admitted if this were a grant to Bowman, the words of the reservation would give him but a life estate. But the right remained in Bowman. He did not part with it; and it remained in him the same as before the deed to the trustees was executed. He conveyed the land to which this right was appurtenant, but he conveyed it charged with the servitude of this ferry right, which he excepted or reserved.

If Bowman derived his right from the deed, words of inheritance would have been essential to give him a fee simple. But he has the same ferry right after the land was conveyed as before it. He excepted it out of the deed, and nothing more was necessary to retain the right unimpaired by the conveyance.

It is insisted that a license to keep a ferry is personal, and cannot be assigned. That as the right of the defendant, Wathen, rests upon transfers from the original grantees, and has no other foundation, it must be held invalid.

In this respect no difference is perceived between a ferry franchise, the franchise of a tollbridge, a turnpike or railroad, or any other franchise of the same nature. Certain privileges are given by the state, and the grantee becomes bound to afford the proposed public accommodation. It is true, the grant is made in the one case to a private individual, and in the others to corporations. But as it regards any matter of public confidence, it would seem to apply as strongly to the individuals incorporated, as to the grantee of the ferry.

But the grantee of the ferry has a right appurtenant to the soil which, by the law, is made an indispensable pre-requisite

to a ferry license. Now we have shown that the ownership of this right may be separated from the ownership of the soil; and if this may be conveyed by the grantee before the ferry license is obtained, may it not be conveyed afterwards? And in this conveyance may not the ferry grant be included?

The public can have no claim on the grantee beyond the requirements of the law; and it is immaterial whether these are fulfilled by the grantee or his assignee. It is probable that the assignee gives a bond and security, as the law requires, or indemnifies the grantee. There must be some settled practice on this subject, which has been so sanctioned, as to become a rule of property. However this may be, there would seem to be no doubt, that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to the realty.

Where an office is conferred which implies personal confidence and a capacity to discharge public duties, no assignment can be made of it. But this has no analogy to the franchise in question.

This question, however, does not depend upon general principles; the statute of Indiana authorizes the transfer of the ferry license, and points out the duties of the assignee. If the ferry shall not be kept up, it may be vacated and annulled on a mode of proceeding authorized by the statute. But the license is granted without limitation, and subject only to the condition that the requirements of the law shall be observed.

The lapse of time is the only question that remains for consideration.

The ferry franchise claimed by the defendant, Wathen, originated in October, 1802. This right was sanctioned by the Legislature of Indiana by an act passed December, 1820. Another ferry license granted subsequently to 1802, and to a different person, is now, and has been for several years past,

by mesne conveyances, vested in the defendant, Wathen, and others, who are not made parties to this suit. Wathen owns one half the interest in the consolidated ferry. This ferry has been regularly kept up, and the requirements of the law observed from 1802 up to this time, making thirty nine years, and nearly thirty eight years to the time of filing the bill.

Bowman's deed to the trustees, in which the ferry right was excepted, was recorded by the recorder of Clark county shortly after it was executed. Bowman continued to reside in Virginia until his decease, in 1826, and his devisees still reside there. The agent Gwathney, who executed the deed was, at the time, a citizen of Louisville where he continued to reside many years; being often in Jeffersonville, saw the ferry in operation, and frequently crossed in it. One of the witnesses states, shortly after the town of Jeffersonville was established this reserved ferry right was spoken of; and another witness, some two or three years after, 1826, heard the same right mentioned among the citizens. At this time Wathen was a citizen of Jeffersonville.

Against the operation of the statute of limitations and of lapse of time, the complainants' counsel insist—

First: That the statute does not run against nonresidents.

Second: That time in equity is applied by analogy to the statute, and that it cannot bar the complainants' right as Bowman was not only a nonresident but several of his devisees at his death were infants, and some of them are still minors.

Third: That the ferry right, set up by the defendant, Wathen, was not established by competent authority, and that the sanctions since given to it, were in violation of the rights of the complainants, and were consequently void.

Fourth: That the defendant, Wathen, stands as trustee in relation to the right of the complainants, and that in such a

case neither the statute of limitations nor the lapse of time can have any effect.

That the statute does not run against nonresidents must be admitted. It only operates against those who are residents of the state, or who may come within its jurisdiction. And it must also be admitted that by analogy the statute is applied in equity as at law, and that in such cases it does not bar the rights of infants. But time in equity often operates as a bar in a case where, at law, the statute could have no effect. And the case under consideration may illustrate this principle. The lapse of time is open to the defendant as a ground of defence, although by reason of the nonresidence of the complainants the statute could have no effect against them at law. This doctrine is fully established.

In the case of *Piatt v. Vattier and others*, 1 McLean's Rep. 160, many authorities on this point are cited. That case was similar to this one. The holder of the title was a nonresident and his right was not barred by the statute. In the case of *Marquis of Chalmondeley v. Lord Clinton*, 2 Jacob & Walker, 1138, the Court say, "at all times courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to state demands, where the party has slept upon his rights, and acquiesced for a great length of time. And this doctrine was sanctioned by the Supreme Court on an appeal of the above case of *Piatt v. Vattier*, 9 Peter's Rep. 416.

It is, also, sustained in the following cases: *Beekford v. Wade*, 17 Ves. 86; *Barney v. Ridgard*, 1 Con. Cas. 145; *Blennerhassett v. Day*, 1 Ball & Beatt. Rep. 104; *Hardy v. Reeves*, 4 Ves. 479; *Harrington v. Smith*, 1 Bro. Par. Cas. 95; *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 93; *Prevost v. Gratz*, 6 Wheat. Rep. 481; *Hughes v. Edwards*, 9 Wheat. Rep. 489; *Willison v. Matthews*, 3 Peter's Rep. 44.

Is the franchise of the defendant invalid on the third ground assumed? Was the license granted in 1802 inoperative, and were the sanctions of the Legislature subsequently given to it of no effect?

The license was first granted by the Governor of the Territory without any express authority of law. At that stage of the territorial government he was, in connection with the judges, authorized to adopt laws of the states, but not to enact them. No law, it seems, could be found applicable to the public emergency, and a resolution was adopted under which the license, in 1802, was granted.

In 1807 the Territorial Legislature provided "that all ferries now kept by license from the Governor, shall be and are hereby declared to be established ferries," &c. Another confirmatory act was passed by the Legislature the 26th December, 1815. And, afterwards, in December, 1820, the Legislature of the state confirmed, by a special act, the franchise under which the defendant claims.

It may be proper here to remark that the case cannot be made to turn upon the validity of the defendant's right unconnected with the lapse of time. But this will be more appropriately considered under the next head.

The right from the first was, at least, *prima facie*. And it may be a matter of doubt whether the power exercised by the Governor, under the emergency which existed, ought not to be sustained. And this view is greatly strengthened, if, indeed, it be not placed beyond doubt, by the confirmatory acts of the Territorial and State Legislatures. But it is supposed that the ferry right reserved by Bowman renders the acts of the Governor, and of the Territorial and State Legislatures, inoperative and void. And this upon the ground that private property can not be appropriated for the public use without compensation.

Where was this right of the complainants for thirty eight years, while this ferry has been kept up by the enterprise of its owners, and enjoyed by the public? All that could be known of it, by searching the county record, was, that Bowman reserved it in his deed to the trustees. But what evidence was this of his continued ownership? That an individual did not convey an interest, that he might have in land, to A, is no very satisfactory evidence, some twenty or thirty years afterwards, that he had not sold it to some other person. At best it was a right that existed in idea. An abstraction. Something that could neither be seen nor felt. Of which no one could have corporeal possession. And yet this intangible thing, in the estimation of the counsel, becomes the vis major to the power of the Territorial Government, and the sovereignty of the State. It resists, and effectually resists, all action for the public good. That such can not have been the effect of this ferry right, under the circumstances, is very clear. No such dormant interest, practically abandoned, can be asserted after the lapse of nearly forty years, to nullify the action of the Government. If it were not barred by the lapse of time, it could not make the grantees of the Government trespassers. Where a case of prima facie right to a ferry license is made out the State, is, in duty bound, to grant a license, should the public convenience require it. And if there be any conflicting right, the owner is bound to assert it in a reasonable time. If he fail to do this the other title is strengthened by time, and may bar that which, at first, was a paramount title.

But is the defendant, Wathen, prohibited from setting up this defence by the relation he bears to the complainants' title? Is he the cestui trust of the complainants, or, did those under whom he claims stand in that relation to Bowman?

That the statute does not run against an established and continuing trust is clear. For, in that case, the possession of

the trustee is consistent with the right of the cestui que trust. And neither the statute of limitations, nor the lapse of time, can, in such a case, operate in favor of the possession of the trustee. But where his possession is hostile, openly and avowedly hostile, the rule is very different.

There can be no stronger case put to illustrate this doctrine, than that of landlord and tenant. On general principles the tenant is not permitted to dispute his landlord's title. Having entered under that title, he can set up no adversary title to protect his possession. And yet if he publicly disclaim his landlord's title, and profess to hold under a hostile title, the statute of limitations will begin to run from the time of such disclaimer. This doctrine is sanctioned in the case of *Willison v. Watkins*, 3 Peters' Rep. 47, 48. In that case the Court say—"the same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and, generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title." 6 Johns. Rep. 272. *Blight's Lessee v. Rochester*, 7 Wheat. Rep. 535, 549.

Where the trustee denies the title of the cestui que trust the statute will operate. To prevent this the trust must be subsisting. *Kane v. Bloodgood*, 7 John. Ch. Rep. 90. *Lockey v. Lockey*, Pree. in Ch. 518. *Harmood v. Oglander*, 6 Ves. 199. *Havenden v. Lord Annesley*, 2 Sch. and Lef. 630. The right under which the defendant claims, from its origin, has been hostile to that asserted by the complainants. So far as the defendant has become seized of any part of the soil bounded by the river, included in the deed of Bowman to the trustees, it might be contended that he was seized to the use of the complainants. But the claiming and exercising of the ferry franchise, is utterly inconsistent with the right set up under Bowman. They can not both exist. The one necessarily excludes the other; and, by consequence, they are hostile to

each other. An uninterrupted possession has been held by the defendant, and those under whom he claims, of thirty nine years—of thirty eight years before the commencement of this suit, and about twenty four years before the decease of Bowman. And what are the circumstances relied on to obviate the effect of this lapse of time? The nonresidence of Bowman, his death, and the infancy of some of his devisees.

As before remarked, nonresidence saves the operation of the statute, but not the effect of time. That Gwathney, the agent of Bowman, who executed the deed to the trustees, and who superintended the sale of the town lots; and especially reserved this ferry right, as attorney, in fact, for Bowman, to be used for him, remained many years a resident at Louisville, after the execution of the deed, is an important fact. He was the special agent of Bowman, as appears from the deed; not only as regards the Jeffersonville property, but of this right in particular. He saw the ferry of Clark in operation in a very short time after the deed was executed; was frequently in Jeffersonville, crossing in the ferry, and it does not appear that he ever remonstrated against its establishment, or attempted to set up the right reserved to his principal. And with the same indifference he daily witnessed the operations of this and the other ferry for fifteen or eighteen years. A notice to the agent is notice to the principal, 13 Ves. 121. 1 Ves. 62. 1 Term Rep. 16. Ambl. 626. 4 Term Rep. 66. And the rule here applies with peculiar force. For there is a strong probability that Gwathney reserved this ferry right without any special instructions from Bowman. He was then peculiarly fitted to protect it, and it was his duty to do so. The lapse of time could not more strongly have operated against the complainants' title, had Bowman resided in Louisville instead of his agent.

There is another consideration entitled to great weight, and that is the nature of the right. It was one connected with the public accommodation, and which the owner must have known, unless exercised, might be lost. By the 2d section of the act of the 17th September, 1807, the Court of Common Pleas was authorized to discontinue a ferry if not used for twelve months.

The foundation of the right was appurtenant to the soil, but the exercise of it depended upon the sanction of the public authority. Diligence was required, then, not only in procuring the public sanction, but, also, in keeping up the ferry. But nothing was done until a very short time before the bill, in this case, was filed. A demand was then made of the defendant, Wathen, that he would surrender the ferry, and his boats, &c., on the terms stated in the bill.

When the ferry was first established, and for many years subsequently, it was not profitable. To some of the proprietors it seems to have been rather a source of expense than profit. And this may be a reason why Bowman's right was not asserted. But now that Jeffersonville has become a thriving city, the country thickly populated, and the city of Louisville a place of great commercial enterprise, the ferry has become profitable. Steamboats are used in the ferry which cost from fifteen to twenty thousand dollars. From morning until night a continued line of travel is passing over it. It has become an object of importance, and an increasing source of wealth.

Neither lapse of time nor the statute operates against infants. And yet if the statute begins to run in the life of the ancestor, it will continue to run after his decease against his minor heirs. And in the case under consideration, after the exercise of this adversary right twenty four years, without molestation during the life of Bowman, it is difficult for the Court to

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close their eyes against the lapse of twelve years which has since occurred. During this period some of the devisees were minors, but the greater part of them were of full age.

Upon the whole, when we consider the nature of this right, its origin, the long residence of Bowman's agent, who reserved it, in full view of the ferry, and the great lapse of time, we are led to the conclusion that no relief can be given to the complainants. They have not, nor did he, under whom they claim, use the diligence which the law imposes for the protection of the right asserted. It is one which, of all others, would seem to impose diligence. Public convenience united with private interest to recommend this course. But both considerations were disregarded. The right has become very valuable. But in the hands of the complainants it has become stale. And such was its character on the decease of Bowman. The bill is dismissed at the complainants' costs.

This decree, on an appeal to the Supreme Court, was affirmed January term, 1843.

KIKINDAL vs. MITCHELL.

The legal effect of a bond or note, payable on or before the day, is different from one payable on the day.

In the one case the obligor has a right to pay before the day, but not in the other. And this difference is material, when the instrument is described according to its legal effect.

Mr. *Stevens* appeared for the plaintiff, and Mr. *Bright* for the defendant.

OPINION OF THE COURT.

This action is brought on two writings obligatory for the payment of nine hundred and fifty dollars each. In the decla-

ration the first writing obligatory is stated to be payable on or before the 22d of February, 1839.

The defendant cravedoyer of the writing obligatory, from which it appears that the words, "on or before," are not in it, and on this ground he demurred for the variance.

This is a technical objection, and the Court have felt a strong disposition to get over it.

The declaration does not purport to set out the bill, obligatory, according to its tenor, but according to its legal effect. And the question is, whether the undertaking to pay on or before the day, gives a different effect to the instrument, from an undertaking to pay on the day. If it does the variance is fatal.

It is suggested that the day of payment having past, the legal effect of the instrument must be the same in the one case as in the other. But this is not the point for decision. The words in the declaration, whether used as descriptive of the instrument, or to state its legal effect, have a reference to the time of its execution.

A bond payable on a particular day, without the consent of the obligee, can not be discharged before that day. But a bond payable on or before the day may be paid at any time, at the option of the obligor, before the day. And does not this constitute a substantial difference between the two instruments. Under one of the instruments the obligor has a legal right, which he is not entitled to under the other. The legal effect, then, of the instruments must be different; and, if different, they must be so described.

In general, whatever forms a constituent part of plaintiff's title must be set out correctly. But this rule is liable to some exceptions. A bill payable to a fictitious payee, or his order, may be declared on as a bill payable to bearer. Chitt. on Bills, (edt. 1839) 178. The payee of a bill or note, payable

to his own order, may state it to have been made payable to himself. *Smith v. McClure*, 5 East. Rep. 476. And a note payable to a married woman, and indorsed by her husband, may be stated to have been payable to the husband. *Arnold v. Revoult*, 1 Brod. and Bing. Rep. 443. *Ankerstein v. Clarke*, 4 Term Rep. 616.

But these variances make no difference in the legal effect of the instruments; and the declarations purported to set out the instruments according to their legal effect.

If the declaration does not profess to describe a deed, or to set it out according to its tenor, but states it correctly in substance, and in its legal effect, a variance will be immaterial. In an action for breach of covenant, proof of a lease from the plaintiff and his wife to the defendant, will support an averment of a lease from the plaintiff alone. Philips on Ev. 212. (edt. 1839.) *Beaver v. Lane*, 2 Mad. 217.

In the case of *Browne v. Knill*, 2 Brod. and Bing. 395, which was an action of covenant, the Court held that the plaintiff was bound to set out the covenant truly. The distinction is, whether the qualification forms part of the covenant or not. If it forms part of the covenant it must be set out, if not it may be omitted. In the case of *The Administratrix of Philips v. Bussell*, 5 Taun. 707, the plaintiff declared on a bond conditioned to pay £100 by six equal payments of £16 13 4, on the 3d October, in every year, until the full sum of one

pounds was paid. A stranger inserted the word hundred between one and pounds; the plaintiff on oyer craved, set it out as being, "until the full sum of £100 was paid," held to be a fatal variance.

We can find no case precisely in point, but we think, from the analogy of the cases, and on principle, we are bound to sustain the demurrer. We do this somewhat reluctantly, on

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account of the character of the objection. On motion leave given to amend the declaration.

THE UNITED STATES vs. SPENCER et al.

Nil debet, when pleaded to a declaration on a penal bond, where breaches are assigned, will not be set aside, on motion, but must be demurred to.

Where a plea sets up no new matter of defence it may be set aside on motion.

The sureties, in a Receiver's bond, can only be made liable for moneys received by the Receiver subsequently to the date of the bond. And if the bond bears date some months after the official term of the Receiver commenced, the declaration is defective, if it do not show the receipt of the money after the date of the bond, and before the expiration of the official term of the Receiver.

A demurrer, filed by the plaintiff, to a plea of defendant, will test the goodness of the declaration.

Mr. *Petitt*, the District Attorney, appeared for the plaintiffs, and Messrs. *Fletcher* and *Butler* for the defendants.

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OPINION OF THE COURT.

THIS action is brought on a bond, in the penalty of \$200,000, given by Spencer as receiver of public moneys, and his sureties.

The declaration states that Spencer was appointed receiver of public moneys the 1st January, 1835, for the term of four years, ending the 31st December, 1839; and that divers large sums of money, arising from the sale of lands, came into and were in his possession during his term in office, &c., which he failed to pay over, &c. In the first count the defalcation is alleged to be the sum of thirty three thousand three hundred thirty nine dollars and sixty eight cents; and in the second,

forty thousand dollars. The bond bears date some three or four months subsequently to the date of the appointment, and the condition is that the said Spencer shall faithfully execute and discharge the duties of his office, then the obligation to be void, &c. The time of appointment is stated in the bond.

The defendant filed the following pleas:

1. The plea of nil debet.
2. That Spencer has well and truly discharged the duties of receiver.
3. That he has paid over the sum of \$33,339 65, the defalcation alledged in the first count of the declaration.
4. That defendants have paid over to the government \$40,000, the defalcation alledged in the second count.
5. That defendants have paid over to the government the debt in the declaration mentioned, to wit: \$200,000.

The District Attorney moved the Court to set aside the first, second and fifth pleas.

The plea of nil debet has been abolished in England, Reg. Gen. Hil. Term, 4 Wm. 4, but it remains in this country subject to the same rules by which it was formerly regulated in England. And Mr. Chitty says, in his pleading, 1 Vol. 552, (edt. 1837) "that where the plea, though informal, goes to the substance of the action, on nil debet to debt on bond, the plaintiff should demur and not sign judgment; and, in general, where the defendants file an improper plea, the safer course is to demur or move the Court to set it aside." And again, in page 518, "when the deed is the foundation of the action, although extrinsic facts are mixed with it, the defendant, if he deny his execution of the deed set forth in the declaration, should plead non est factum, and nil debet is not a sufficient plea. 1 Saund. Rep. 38, note 3. Ib. 187, a, note 2. But in debt for a penalty on articles of agreement, or on a bail bond, or on a bond set-

ting out the condition and breach, if nil debet be pleaded the plaintiff ought to demur."

The motion to set aside this plea is, therefore, overruled. If the plaintiff wish to raise the question whether it is a proper plea in this case he must raise it by demurrer.

The Court, also, overrule the motion as to the second plea but they sustain it as to the fifth.

The fifth plea sets up that the defendants have paid the debt in the declaration named, to wit—the sum of two hundred thousand dollars.

Now the third and fourth pleas alledge the payment of the defalcations averred in the first and second counts, and either of these pleas, especially the latter, if sustained, is a full discharge from the bond. Why then can it be necessary, or even proper, to add the fifth plea, as to the payment of the penalty?

The breaches are specially assigned in the declaration, and the plaintiffs, in the recovery of damages, are limited to the breaches assigned. They cannot go beyond them.

If the action were brought for the penalty, the fifth plea would undoubtedly be proper, as it contains a full answer to such a demand. But the plaintiffs go for the amount of the defalcations and nothing more; and as the third and fourth pleas contain full answers to these, and no other or different effect can be given to the defence set up in the fifth plea, we think it may be set aside. It sets up no new matter of defence, and it unnecessarily, therefore, encumbers the record.

The plaintiffs having filed a demurrer to the first plea, the defendants' counsel ask the attention of the Court to the form and substance of the declaration.

The breaches are the nonpayment, by Spencer, of certain sums of money received by him during his official term, and it appears the bond was not executed until some months after the commencement of his official term. And it is insisted that the

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sureties are not responsible for any moneys received by Spencer before the date of the bond.

That the sureties are only liable for moneys received by the receiver subsequently to the date of the bond, and before the expiration of his term, is clear; and it is equally clear that this liability must be shown, by proper averments, in the declaration. In this respect, the declaration is fatally defective. It does not show that the sureties are bound to pay any part of the defalcations charged. *The United States v. Boyd et al.*, 15 Peters, 206. On motion leave is given to amend the declaration.

The demurrer is sustained to the plea of nil debet.

SAMUEL BISPHAM vs. GAMALIEL TAYLOR et al.

Where a Marshal takes insufficient appearance bail, he is only responsible for the actual injury sustained by the plaintiff in the execution.

In such a case the insolvency of the defendant may be shown in mitigation of damages.

But the rule is different where securities are taken under the replevin law of Indiana.

The act requires "sufficient freehold securities," and the bond operates as a judgment, and suspends the original judgment.

Under this act the Marshal is liable, unless he takes freehold securities, whose unincumbered lands, at the time, at a fair estimate, are equal in value to the amount of the judgment.

The officer has the means of ascertaining the sufficiency of the sureties, and he is bound to use them.

Messrs. *Fletcher*, *Butler* and *Yandis* appeared for the plaintiff, and Mr. *Brice* for the defendant.

OPINION OF THE COURT.

THIS action is brought against Taylor and his sureties, as Marshal, for taking insufficient bail under the act of Indiana, "to subject real and personal estate to execution."

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The defence set up is that the defendant, in the execution under which bail was taken, was insolvent, and that, consequently, the plaintiff was not injured.

The 14th section of the above act provides, "that when execution of any kind may issue upon any judgment upon which no stay of execution may have been taken, under the 13th section of the same act, the officer issuing the same shall indorse thereon that the same is repleviable, and, also, the date of the rendition of such judgment; and the person against whom such execution may have been issued may replevy the same, &c., by tendering to the officer having such execution in his hands, a bond with one or more sufficient freehold securities, made payable to the execution plaintiff, in a penalty of at least double the amount demanded by such execution and conditioned for the payment of the full amount demanded by such execution, together with the interest and costs accruing and to accrue, &c., which bond shall be returned to the clerk to be recorded, &c., and such bond shall be taken as and have the force and effect of a judgment confessed in a Court of Record against the persons executing the same and against their estates, and execution may issue thereon accordingly." This bond suspended all action on the original judgment for the time stated in the statute. In effect, the new judgment was substituted for the prior one.

The insolvency of Pollock, the defendant in the execution, is admitted, and the question is raised whether this does not excuse the Marshal, or mitigate the damages in the case. The defendant's counsel insists that it does. That the plaintiff can only recover damages for the injury done by the misfeasance of the officer; and that the defendant being insolvent no injury was suffered by the plaintiff.

It is a well settled principle, that where an action is brought for an injury done, whether in the discharge of official duty or

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otherwise, the damages are measured, generally, by the extent of that injury. As, for instance, if a sheriff or marshal levy upon property and through negligence suffers the property to be destroyed, or to be taken back by the defendant, the officer is only liable for the value of the property. And insufficient appearance bail, taken on mesne process, will only subject the officer to nominal damages, if he shall prove that the defendant in the process was, at the time, insolvent. The object of such bail being to coerce the appearance of the defendant, and subject his person and property to the judgment of the Court, the inquiry is what damage has the plaintiff sustained by the non-appearance of the defendant. 3 Starkie Ev. 1341, note 11. Mass. Rep. 89, 207, 10. 1b. 470. 2 Bac. Ab. 263. But the case under consideration is wholly different. The replevin bond operates as a judgment, and is, in fact, a substitute for the judgment on which the execution was issued. If it does not nullify it suspends such judgment. And the statute, to produce this effect, very properly requires "one or more sufficient freehold securities." Of their sufficiency the officer, serving the execution, is bound to judge. , And if he be culpably negligent he is justly responsible.

The replevin bond is for the payment of the judgment. It is in fact and in law a judgment under the statute; consequently it is subject to no collateral condition. The officer, by using ordinary diligence, may always ascertain the sufficiency of the security. Before he takes the bond he may require the most satisfactory evidence on this subject. He may demand the certificate of the recorder of deeds, showing the extent of the real estate of the sureties, and, also, whether there be any liens upon it. Similar evidence may be required from the clerks of courts as to any judgment liens. And this he may require the defendant, in the execution, to procure without any labor or expense on his part. The value of the estate may be esti-

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mated by judicious and disinterested men in the neighborhood. If this precaution be taken, which may be reasonably required, and by a great and unexpected fall in the value of property it may be insufficient, the officer would not be liable. If the property of the sureties was sufficient to answer the requisitions of the statute, at the time the bond is taken, no subsequent change can attach liability to the officer. 1 John. Rep. 215. 7 Ib. 189. 2 Term 132. 2 Greenleaf, 46.

The real estate of the sureties was embarrassed by judgment and mortgage liens; and they owed other debts. Evidence has been heard as to the amount of their personal property, not as constituting any part of the sufficiency contemplated by the statute, but to show that they had the means of discharging, to some extent, the demands against them. But the Marshal was bound not only to see that the sureties were freeholders, but freeholders of unincumbered real estate, at least sufficient, at a fair valuation, at the time the bond was executed, to pay the judgment for which they were bound. And if the jury shall find, from the evidence, that the lands held by the sureties, at a fair estimate, the time they became bound, after deducting all liens upon them, were of less value than the amount of the judgment, they will find for the plaintiff such difference in damages. And if they shall find that the liens were equal to the full value of the lands, then they will find for the plaintiff the full amount of the judgment with interest.

The jury found for the plaintiff a part of the amount of the judgment. A motion was made for a new trial, which was continued under advisement and afterwards overruled.

Doe ex dem R. Godfrey v. Beardsley.

DOE EX DEM R. GODFREY vs. BEARDSLEY.

The fee in unsold lands is either in the Federal or State Governments.

The Indians have only a right of use, which, however, can not be divested, except by purchase or war.

An Indian treaty, which cedes lands within certain boundaries, reserving certain parts, does, in no respect, change to such parts the original right.

But, if a treaty declares there shall be granted certain tracts designated, to certain persons, and, in the same article, these are referred to as grants, they are held to operate as such.

The treaty is best explained by itself.

Where, in a treaty, the lands reserved and granted to individual Indians, the lands can not be conveyed without the permission of the President, that permission may be given in such form as the President shall think proper. Such permission having been given by the President, his successor can not revoke or annul it, especially where the rights of a third person are concerned.

The acknowledgment and recording of a conveyance of land, in Indiana, operates as proof of the instrument and notice. They are not necessary to the validity of the deed.

Inadequacy of consideration no ground to infer fraud, unless it is so great as at once to strike every person with its grossness.

Notice of a claim is sufficient if it put the party on inquiry.

Evidence of identity, which describes the land so as to distinguish it from other tracts, sufficient for a deed, and, also, in an action of ejectment.

Messrs. *Smith, Butler and Bates*, appeared for the plaintiff, and Messrs. *Stevens and Switzer* for the defendant.

OPINION OF THE COURT.

THIS is an action of ejectment, brought by the lessor of the plaintiff, to recover possession of a section of land on the St. Joseph river.

To establish his title, the plaintiff introduced in evidence an Indian Treaty, of a cession of land, held at Chicago, between Lewis Cass and Solomon Sibley, commissioners on the part of the United States, and the Ottawas, Chippewas and Pottawattamies, the 29th August, 1821.

In this treaty, among other reservations of land, there was reserved to Pierre Moran, a Pottawattamie Chief, one section

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of land. In the treaty it was provided, that the land therein stipulated to be granted, shall never be leased or conveyed by the grantees or their heirs, to any persons whatever, without the permission of the President of the United States. And such tracts shall be located after the said cession is surveyed, and in conformity with such surveys, as near as may be, and in such manner as the President may direct.

A petition of Pierre Moran to President Adams, for leave to sell the land, was offered. That this leave should be given, was recommended by Lewis Cass, Governor of Michigan, &c., and Thomas L. McKinney, Superintendent of Indian Affairs. On the petition was indorsed, 'the request of the petitioner, Pierre Moran, is granted.' Signed, John Q. Adams, and dated the 28th November, 1826.

The copy of a deed was then offered, from Pierre Moran to Richard Godfrey, the lessor of the plaintiff, for the above section of land, dated the 2d February, 1827. The deed was acknowledged and recorded, in Monroe county, Michigan, the same year. The consideration named was three hundred dollars.

By consent, the signatures of the witnesses to this deed were proved by persons who were acquainted with their signatures, and who had seen and examined the original deed.

The original, with the proceeding thereon, was filed in the land office, and copies, as above, were certified; and, it appeared, that this was the usual course of the land office. On this proof the copy was admitted.

A map from the General Land Office, and several letters from the Commissioner of the General Land Office, to the Register of this land district, showing that section five was the land in controversy, was offered, which were objected to, on the ground that the letters of the commissioner were not evidence, as between the present parties.

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The fifth section of the act, entitled an "act to reorganize the General Land Office," approved the 4th July, 1836, provides, that it shall be the duty of the commissioner to cause to be prepared, and to certify, under the seal of the General Land Office, such copies of records, books and papers, on file in his office, as may be applied for, to be used as evidence in courts of justice. The objection was overruled, and the evidence admitted.

Evidence was then offered to show that the consideration was one dollar per acre, and not the amount named in the deed; that the sum of one hundred and twelve dollars was paid, and the residue was to be paid when Godfrey received the patent from the Government. Objection being made, that a different consideration can not be proved, from the one stated in the deed, the Court said that, in England, the rule seemed to be settled, that where the consideration was acknowledged to be received in the deed, and the grantee, his heirs, &c., were released from the payment of the same, the grantor was estopped from showing, in contradiction to the deed, that the consideration had not been paid. *Baker v. Dewey*, 1 Barn. & Cres. 704. But the American rule, with the exception of decisions in Maine and North Carolina, are believed to be different.

Where the operation or effect of the deed is not attempted to be impeached, the consideration, named in the deed, is treated like the date, as formal, merely, and a different sum may be shown to have been paid, or agreed to be paid. *McCrea v. Purmort*, 16 Wend. 460. *Goodwin v. Gilbert*, 9 Mass. Rep. 310. *Harvy v. Alexander*, 1 Rand. Rep. 219. The objection was overruled, and the evidence admitted.

To rebut the allegation of fraud set up by the defendant, several witnesses were examined, who stated, at the time the above purchase was made, the land was not considered worth more than one dollar per acre. One of the witnesses stated

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he considered the land, under the circumstances, worth less than the above sum. And here the plaintiff rested his case.

The defendant then offered a deed for the same land to him, consideration named, fifteen hundred dollars, dated 21st April, 1831, and acknowledged on the same day. On this deed there was the following indorsements:

“ I certify that the sum of fifteen hundred dollars, for the land within mentioned, has been amply secured by a mortgage on said land. Five hundred dollars are to be paid when this deed is approved, and the balance, of one thousand dollars, to be paid in three equal annual payments; and I respectfully recommend the conveyance for approval. 16th May, 1831. Signed, John Tipton, Indian Agent, &c.

“ Washington, 18th January, 1832. I hereby approve and sanction the within deed of conveyance, from Pierre Moran to H. Beardsley; and that, before the same shall be delivered to the purchaser, the Indian agent cause to be paid out of the purchase money, to Richard Godfrey, the sum of one hundred and twelve dollars, the amount paid by him, and received by said Moran. And that the balance of the purchase money the said agent cause to be secured, by a valid mortgage, on the property herein conveyed. Signed, Andrew Jackson.”

Several witnesses were examined by the defendant, some of whom stated, when he made the purchase, the land was worth fifteen hundred dollars; and Col. Edwards thinks it was worth three dollars per acre, in 1828.

The plaintiff then proved, by several witnesses, and by the confession of the defendant, that, at the time the deed was executed to him, in the office of the Indian agent, and in his presence, Pierre Moran said that he had sold the land to Godfrey, but that he refused to pay him for it, and he would sell it again.

The land, it seems, is very valuable, mills having been constructed on a part of it, and, also, a town.

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The facts being before the Court, the question was raised as to the validity of the plaintiff's deed, which was argued at length. Three grounds were assumed—

First: That the legal title is still in the Government, no patent having issued to Pierre Moran;

Second: That the sanction given by Mr. Adams to the sale, was informal and invalid;

Third: It was revoked and annulled by his successor, Gen. Jackson.

It is admitted that the legal title to their lands has never been considered, by any branch of the Federal Government, as vested in the Indians. And hence it has been held, that a State might grant the fee in lands, occupied by Indians, subject to their right. The Indian right is that of occupancy; and, until this right shall be extinguished by purchase, no possession adverse to it can be taken.

It is also admitted, that a mere reservation of the Indian right to a certain part, within described boundaries, leaves the right reserved, as it stood before the cession. But, on looking into this treaty, there will be found, in the case of Pierre Moran and many others, more than the mere reservation of the Indian right.

The first article of the treaty sets out the boundaries of the cession. The second article provides, "there shall be reserved" certain tracts of six, four, and three miles square, for the use of the Indians. And, in the third article, it is declared, "there shall be granted by the United States, to each of the following persons, being all Indians by descent, and to their heirs, the following tracts of land." (Pierre Moran is enumerated as owning one section, under the above provision.) And, in the conclusion of the third article, the language is, "the tracts of land herein stipulated to be granted shall never be conveyed, &c., except by permission of the President."

It is insisted that, although this treaty having been ratified, is the law of the land, it can not operate as a grant. That a patent is necessary to convey the title, and that the words of the treaty, "there shall be granted," evidently referred to the emanation of a patent or act of Congress.

There is no mode by which the intention of the parties to an instrument can be more certainly ascertained than by comparing the words of the part controverted, with the words used in other parts which are not controverted.

Now, in the third article, in which the words, there shall be granted, &c., are used, and, but two sentences below it, the following words are found: "the land granted to the persons immediately preceding, shall begin," &c. The words immediately preceding, as it regards the grant, are, in no respect, different from the words which follow, and which include the right of Pierre Moran. And if the preceding words amount to a grant, as the treaty expressly declares they do, there can be no doubt as to the character of the titles that follow. This is clearly shown in references to individual grants in the same article. To John B. La Dime, son of, &c., one half section, adjoining the tract before granted. To Jean B. Chardonai, two sections of land, adjoining the tract granted to John B. La Dime. To Pierre Le Clerc, one section of land, above, and adjoining, the tract granted to Moran and his children, (referring to the tract now under consideration.) To Antoine Roland, one half of a section, adjoining, and below, the tract granted to Pierre Moran. In the same article there are several other references to the lands designated, as given to individuals, which are called grants.

But, to give a construction to this part of the treaty, it is unnecessary to rest upon the exposition given in the same article. Other parts of the treaty show how the words, shall be, are applied.

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In the second article, it is declared "there shall be reserved," &c. Was this an act done, or to be done? The sixth article declares the United States shall have the privilege of making and using a road, &c. Does this grant require any future action to give full effect to it? In the fifth article it is declared, that "the stipulation contained in the treaty of Greenville, relative to the right of the Indians to hunt upon the land ceded, &c., shall apply to this treaty." Does not this right vest, without any further act by the United States? A legislative grant requires no further evidence of title. This treaty is a law, and it has been acted under by the Executive, as containing a grant to Pierre Moran. No patent has been issued, nor has one been deemed necessary, to perfect the title. A conveyance of it has been authorized by the President. From the words of the treaty, and the construction which has been given to it, we can entertain no doubt that the fee was vested in Pierre Moran.

In the Spanish treaty of 1819, which ceded the Floridas to the United States, the 8th article declared that "all grants of lands, made before the 24th of January, 1818, by His Catholic Majesty, &c., shall be ratified and confirmed, to the persons in possession of the lands, to the same extent that the same grants would be valid, if the Territories had remained under the dominion of His Catholic Majesty." These words, in the case of *The United States v. Arcondondo et al.*, 6 Peters' Rep. 743, were considered as importing a present confirmation. And the same construction was affirmed, in the case of *The United States v. Perchemon*, 7 Peters' Rep. 89. In this case the Chief Justice says: "Although the words, 'shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself." And the Court overrule a different construction,

given to this same clause of the treaty, in the case of *Foster and Elam v. Neilson*, 2 Peters' Rep. 314.

The second objection, that the sanction to the sale, given by Mr. Adams, was informal and invalid, can not be sustained.

Neither the treaty, nor any law, prescribed the form in which this sanction should be given. The treaty imposed the duty upon the President, and he could execute it in such form and manner as his discretion should dictate. Now, where this power is so exercised, how can the form be objected to? Can the Judiciary declare the act invalid, because the form in which it was done is not exactly in the manner they should have prescribed?

The Executive, as an independent branch of the Government, has the same right to adopt its own forms, in the performance of its own duties, as the judicial or legislative departments. The law-making power may prescribe the form in which judicial or executive duties shall be done; but where a duty is enjoined, and this is omitted, the discretion of the department, as to the mode, must be exercised.

Except by the permission of the President, Pierre Moran could not convey this land. That permission was obtained before the deed was executed. Now, whether it would have been more judicious to have withheld the sanction until the execution of the deed, is a matter about which differences of opinion may exist. But whether given before, or after the deed, it is equally within the power of the President. It may be proper, however, to remark that, as the conveyance could not be made without the permission, it would seem that the permission should precede the execution of the deed.

The last position, that the permission given by Mr. Adams was revoked and annulled by Gen. Jackson, is wholly untenable. Whatever acts may be done under the pretence of reform by the Chief Executive, unless such acts depend upon his dis-

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cretion, and come within his executive duties, they are utterly null and void. They can vest no right, nor afford any ground of justification; much less can they divest private interests—interests which have been acquired under the laws of the country.

It is difficult to perceive under what pretence this power was attempted to be exercised by Gen. Jackson. He had the same power as his predecessor, and no greater. The executive function having been exercised on the subject, the power is exhausted. And this is especially the case, where the interest of a third party is involved.

Under no notion that the power had been injudiciously exercised by Mr. Adams, or that Pierre Moran had not made a good bargain, or on any other pretext, had Gen. Jackson any right to annul the permission granted. There is, indeed, one ground, and only one, on which this act might be placed, and that is, that it had been inadvertently done without a knowledge of the act of his predecessor. But such a supposition can not arise, as, by the indorsement of Gen. Jackson upon the deed of Beardsley, it seems he had a full knowledge, not only of prior permission to convey, but that, under it, a conveyance had been executed. Indeed, evidence of this remained on file in the General Land Office.

This act of Gen. Jackson can not be placed upon a supposed fraud by Godfrey, in obtaining a conveyance from Moran. If fraud existed, the courts were open to investigate it, as between Moran and his grantee. It was not a matter which the Executive could try. Besides, fraud is not to be presumed. That it may be established by *exparte* evidence, on inquiry by the Executive, and the rights of a party annulled, without notice, would be a principle as new in the law of evidence, as it would be singular as a rule of property.

A question is also raised, whether the deed of Moran to Godfrey, never having been acknowledged and recorded within the State of Indiana, as the law requires, can be treated as an operative conveyance.

The power of the State is undoubted, in regulating the mode in which real property within it shall be transferred, either by deed or operation of law. Under the statute, the acknowledgment and recording of the deed operates as notice, but is not necessary to its validity.

The jury were charged by Judge Holman—

First: That fraud is never to be presumed, but may be proved by circumstances; that, to infer fraud from inadequacy of consideration, it must be so great as to strike any one at once; that, from some of the witnesses, it would seem, the consideration paid, and agreed to be paid by Godfrey to Moran, was the full value of the land, under the circumstances which then existed.

Second: That, if the jury believe that Beardsley had notice of the existence of Godfrey's claim, at the time he received his conveyance, or before he paid the consideration, the defendant could not be protected as an innocent purchaser, for a valuable consideration, without notice.

Third: That the evidence identifying the land was sufficient, if it showed the situation of the premises, so that they could be distinguished from other tracts of land. That this is a good description in a deed, and, also, in an action of ejectment.

Fourth: That, in the opinion of the Court, there was no evidence that the one hundred and twelve dollars had been paid to Godfrey, as required by the indorsement on the deed of Beardsley by Gen. Jackson.

The jury, having been out a part of two days, returned into Court, and, declaring that they could never agree, the Court discharged them, and continued the cause.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1841.

BORK vs. NORTON.

To render a witness incompetent he must be interested in the event of the suit.

He is incompetent if the verdict can be evidence either for or against him.

The consignee of goods, who has delivered them over, without the payment of freight, is a competent witness in a suit, by the master of the vessel, against the owner of the goods.

Where a vessel is unable to reach the destined port, and the owner of the cargo receives it, at an intermediate port, freight, pro rata itineris, may be recovered.

The master, who is driven into an intermediate port by stress of weather, and his vessel is unable to proceed, is bound to repair his vessel, in convenient time, or procure another vessel to convey the goods.

And if he fail in this, he is not entitled to freight.

Where the owner of the cargo is the cause why it is not transported to the port designated, full freight may be demanded.

A permanent embargo excuses the master from the performance of his contract.

If the obstruction be temporary it suspends it.

A contract for the transportation of goods on our Lakes may not, in every respect, be subject to the maritime rule, which applies to the high seas.

If there be an obstruction on the Lake, a land conveyance may be resorted to. This preferable to a delay of several months.

Mr. *Morris* appeared for the plaintiff, and Mr. *Arnold* for defendant.

OPINION OF THE COURT.

THE plaintiff being master of the brig Illinois has brought this action for the freight of certain merchandize from Buffalo to Chicago. The amount claimed, fourteen hundred dollars.

A written agreement between the defendant and the agent of the American Transportation Company, by which the company bound themselves to deliver the goods at Chicago, &c., at a certain sum per hundred, was given in evidence.

The deposition of Hubbard, who was the consignee of the cargo, and to whom a part of it was delivered, was offered in evidence, which was objected to on the ground that he was an interested witness.

In his deposition Hubbard being asked the question as to his interest, stated that he had none, whatever, in the event of the suit. But it is insisted that having received a part of the goods and delivered them without the payment of freight, he is liable to the plaintiff for the amount, and that his evidence, which may establish the right of the plaintiff against the defendant, will go to discharge himself.

This witness states that he delivered the goods to the defendant who, at the same time deposited with him five hundred dollars in scrip, which was to be subject to the order of the defendant, and was not to be applied in payment of the freight except by his direction.

There can be no doubt that the freight is recoverable in the name of the master of the vessel. Abbott, pt. 3, Ch. 2. 4 Cowan, 475. And it is equally clear that he may recover it from the consignee of the goods, or the owner, if they have been delivered to him and the freight has not been paid.

The master had a lien upon the goods, and was not bound to deliver them until his transportation charge was paid. And so the consignee, who is liable for the freight, may refuse to deliver the goods to the owner until the freight shall be paid. But if, in the one case or the other, the goods are delivered without payment of the freight, an action may be maintained for it. And it is optional with the master, when the goods have gone into the hands of the owner, whether he will sue the con-

signee or the owner. He has, in this case, sued the owner and the question is, whether the consignee is a competent witness to prove the delivery of the goods.

Is Hubbard interested in the event of this suit? Can the verdict be used either for or against him as evidence? These are believed to be the true questions; for if he is not interested directly in the event of the suit, and the verdict cannot be used as evidence against or for him—if he have any interest it must be an interest in the question which does not exclude him.

Although the plaintiff has a demand against the consignee and the owner for the freight, it is not a just demand. A recovery, without satisfaction, against the owner of the goods, cannot be pleaded in bar to a suit against the consignee. And it is very clear that the verdict which the plaintiff may obtain in this suit can be no evidence either for or against the consignee in an action against him for the freight. Then how can he be an incompetent witness.

In the case of *Bent v. Baker*, 3 Term Rep. 27, after an elaborate argument and consideration of the question, the Court held that a person who had been employed as a broker, by the plaintiff, in procuring the policy to be subscribed by the defendant, and afterwards had himself subscribed as assurer, was a competent witness for the defendant.

In a replevin against one of two brokers, partners, who took the goods, the partner not sued was held competent for the defendant. *Duncan v. Meikleham*, 3 Car. & Payne, 172. So, where process was issued against three joint trespassers and two only served, the other trespasser never having appeared or pleaded, he was held to be an admissible witness for the defendants; and the Court said, "the incompetency of a witness, on the ground of interest, must be confined to a legal fixed interest in the event of the suit." *Stockham v. Jones*, 10 John. Rep. 21.

The rule is general that one cotrespasser, or, indeed, any joint wrongdoer not sued, is a good witness for another. *Humphreys v. Miller*, 4 Car. & Payne, 7. Where the plaintiff, being indebted to the witness, promised him an order on the fund in question when recovered, this was held not to render him incompetent. *Ten Eyck v. Bill*, 5 Wend. 55.

An interest in the suit pending can alone affect the competency of a witness. *Awings v. Speed et al.*, 5 Wheat. 420. In general the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question and does not exclude him. *Evans v. Eaton*, 7 Wheat. 356.

The deposition of Hubbard was admitted, and, with many others, was read in evidence. These proved that the vessel was detained at Buffalo several days, by the order of the defendant, until the reception of all his goods at that place. That after her cargo was on board high and adverse winds prevented her leaving the port; and that having left before the storm ceased she encountered much peril, and was driven back to Buffalo. She left that port so soon as the state of the weather permitted, late in October or the beginning of November, and passing Detroit, on her way to Chicago, she encountered high winds and floating masses of ice in Lake Huron, which placed her in imminent peril, and forced her back to Detroit, where her cargo, having been much exposed and somewhat injured, was unladen. During the winter the defendant had the greater part of his goods conveyed to Chicago, by land, at a heavy expense. So soon as the navigation opened, in the spring, the vessel, with that part of the cargo which remained at Detroit, sailed for Chicago and delivered it to Hubbard, the consignee, as above stated.

Under this state of facts the plaintiff contends that he is entitled to full freight. That the delays in the voyage were not attributable, in any degree, to his default, and that he performed the contract, by running the vessel to Chicago so soon as it was practicable to do so, and that a proper construction of his contract can require nothing more from him than this.

And, in the second place, it is insisted that under the most unfavorable view which can be given to his case, he is entitled to freight pro rata itineris.

On the other side the defendant's counsel insists, that the plaintiff, having failed to perform his contract, can recover no compensation.

Marine contracts, and this is in the nature of a marine contract, are not of frequent cognizance in our courts of the west; but the rules by which they are governed, which emanate from the civil and maritime law, are founded in good sense and the great principles of justice, and are not dissimilar, in most respects, to the settled principles of the common law.

As a general principle freight or goods is not payable till delivery at the port for which they are shipped. *Hawland v. The Lavinia*, 1 Adm. Decis. 126. And it is an admitted principle that where the owner of the cargo is himself the cause of defeating the voyage, freight is recoverable the same as if the voyage had been performed.

If a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. *The Saratoga*, 2 Gallis. 164.

If a freighted ship becomes disabled on its voyage accidentally, and without any fault of the master, he has his option either to refit it, in convenient time, or to procure another ship to carry the goods. If the freighter disagrees to this, and will not suffer it, the master shall yet be entitled to his whole freight as of the full voyage. 2 Burr. 887. And this is conformable to

the laws of Oleron, article 4. 2 Brown Civ. & Adm. Law 191. But in the event of another vessel being employed, the master could recover only under the first charter party. He would not be entitled to any increased freight agreed to be paid by the new contract. Still the goods would be bound under the new contract, and any increased sum which the owners might be compelled to pay would be chargeable, perhaps, to the insurers.

It is insisted that on the above principle the plaintiff is entitled to recover full freight. That the taking away of the greater part of the goods from Detroit, was the act of defendant, in his own wrong, and cannot prejudice the plaintiff. That he was ready to perform, and did perform, his part of the contract, by completing the voyage so soon as the upper lakes were navigable. And the cases in 4 John. Ch. 218. 16 John. 36, 364 and 356. 10 East. 556. 2 John. Rep. 325. 9 John. Rep. 210, are relied on in support of this claim.

It may well be a matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of the present case may test this principle.

The defendant is a merchant, and the cargo, in question, consisted of merchandize. It was important that his goods should be conveyed to Chicago expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the delivery of his goods? The vessel arrived at Chicago some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor

any reasonable construction which can be given to the contract.

In the case of *Hadley v. Clark*, 8 Term Rep. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the further orders of council; it was held that such embargo only suspended, but did not dissolve the contract between the parties; and that, even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff, in damages, for the nonperformance of their contract.

The Court well remarked, that that was a case of great hardship, both parties being innocent, one must suffer. Lord Kenyon put the case on the ground that a temporary interruption of a voyage, by an embargo, does not put an end to the contract. And, he adds—if this contract were put an end to, it might equally be said, that interruptions to a voyage from other causes would, also, have put an end to it—as a ship being driven out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the northwest parts of this Kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark where they have been obliged to winter.

A distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risks are numerous, and, being well understood, may, to some extent, at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is, the transportation by sea is the only means of conveyance in the one case, while, in the other, if obstructions on the water occur by ice or otherwise, a land transportation

may be adopted. And the contract is made in reference to this fact, either express or implied.

It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months, that the owner of the goods should be bound to wait this period for their delivery. In the decision cited above, the plaintiff recovered only £297 18, which sum he paid for insurance and other charges.

But it is not material to decide this point. The greater part of the goods were received by the defendant at Detroit, and there is no complaint that the residue of the cargo was not only duly delivered, by the vessel, at Chicago, in the spring. Now, there is nothing in the evidence which goes to show that the goods, received by the defendant, were not voluntarily delivered to him by the agents of the plaintiff, or of the transportation company in whose service he was employed. This being the fact, it must be considered a modification of the contract by the parties. And it is upon this ground that a pro rata freight may be recovered. In the case of *Sompays v. Sater*, 1 Mason 43, the Court say, a pro rata freight can be demanded only upon the ground that there is a voluntary receipt of the goods, at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther.

Where the cargo is compulsorily received by the owner, no freight is earned. *Hustin v. Union Ins. Co.*, 1 Wash. C. C. Rep. 530.

In *Cook v. Jennings*, 7 Term Rep. 382, where the defendant to pay so much for freight for goods delivered at A, it was held, freight could not be recovered, pro rata itineris, if the ship be wrecked at B before her arrival at A, though the defendant accept his goods at B. 1 B. and P. 634, 240. 1 East. 698. 4 East. 45. 1 Taunt. 300.

There can be no doubt that to entitle the master to a pro rata freight, where the voyage has only in part been performed, the acceptance of the goods by the owner or his agent must be voluntary. If the master, without sufficient cause, refuse to repair his ship, at the intermediate port, and send on the goods, or procure another vessel for that purpose, he can recover no freight. *Welch v. Hicks*, 6 Cowen, 504.

In the case of *Mitchell v. Darther et al.*, 2 Bing. N. C. 555, which was decided in 1835, where defendants chartered plaintiff's ship from London to Buenos Ayres, there to deliver her cargo, reload, and proceed to a port between Gibraltar and Antwerp; freight for voyage out and home £1300, if delivered at Gibraltar, in Spain, London, or Liverpool; £200 to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo.

The ship proceeded to Buenos Ayres, delivered her cargo there, and sailed again with a cargo of hides, which defendants consigned to Gibraltar. At Fayal the ship and about one third of the hides were lost. The vice-consul of Fayal, acting on behalf of the defendants, at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to defendants' consignees at Gibraltar, where they were accepted, and the freight from Fayal to Gibraltar paid by defendants. Held, that the plaintiff was not entitled to the £1300, freight; that he was not entitled to pro rata itineris for freight to Buenos Ayres, or from Fayal to Gibraltar, but that he was entitled to freight, pro rata, from Buenos Ayres to Fayal.

Had the vessel been lost at Buenos Ayres nothing more than the £200 could have been claimed, and that sum was paid on the departure of the vessel.

On an examination of the authorities, we think the rule is well settled, that where, through any cause, not within the control of the master, the voyage is terminated at an interme-

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diate port, where the cargo is voluntarily received by the owner, that freight pro rata itineris may be demanded. And in this case they so instructed the jury.

And they, also, instructed the jury that the deposit of the five hundred dollars in scrip, by the defendant, with Hubbard, the consignee, being special, could not be applied as a payment for freight, unless a special direction to that effect was subsequently given by the defendant. For the goods delivered at Chicago the plaintiff is entitled to full freight under the contract. And whether any part of this freight has been paid, it will be for the jury to determine from the evidence. The jury found for the plaintiff.

THE UNITED STATES vs. LANCASTER.

The Federal Government has no criminal jurisdiction except what is given by statute.

An offence described in the words of the statute is, generally, sufficient.

Offences under the postoffice law are not felonies.

They are misdemeanors; and, in such cases, less nicety in the form is required, than in indictments for felonies in England.

It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster.

Nor to describe the bank notes, particularly, inclosed in the letter.

But if either the letter or the notes be described in the indictment, they must be proved as laid.

It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed.

The evidence of an accomplice is competent, but it should always be received with caution.

Mr. *Butterfield*, the District Attorney, appeared for the plaintiffs, and Messrs. *Baker*, *Lamburn*, and *Dunbar*, for the defendant.

The United States v. Lancaster.

OPINION OF THE COURT.

THIS is an indictment against the defendant for stealing letters containing money from the mail, while he acted as postmaster, at Carrolton, in this State.

The indictment contained six counts. And a motion was made, and argued at length, to quash the second, fourth, fifth and sixth counts. The second count charged that, within the district aforesaid, the said Charles Lancaster did then and there secrete and embezzle one letter which came to his possession, and was intended to be conveyed by post, containing divers bank notes for the payment of money, he, the said Charles Lancaster, being, at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit: A postmaster at Carrolton, in the county of Greene, in the State and district aforesaid.

This count is framed under the 21st section of the act of 3d March, 1825, to punish offences against the postoffice regulations, which provides that if any person, employed in any of the departments of the postoffice establishment, shall secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he or they shall be intrusted, or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, &c., such person shall, on conviction for any such offence, be imprisoned not less than ten years, nor exceeding twenty one years.

It is objected to this count:

First: That the charge of embezzling the letter is not specific;

Second: That the bank notes are not described;

Third: No crime charged;

Fourth: No averment that defendant did the act at Carrollton;

Fifth: A conviction on this count could not be pleaded in bar to a charge of embezzling a specific letter, &c.

The Federal Government has no jurisdiction of offences at common law. Even in civil cases the Federal Government follows the rule of the common law as adopted by the States, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides. The offences defined in the postoffice law are misdemeanors and not felonies. The statute does not declare them to be felonies, and, by the Federal Government, they are only punishable under the statute.

In describing an offence under the statute no technical words are necessary as in many common law offences. In the case of *The United States v. Mills*, 7 Peters' Rep. 142, the Court say—"the general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony." In an indictment for murder no word can be substituted for *murdravit*; in burglary, for *burglariously*, &c.

The second count charges the offence in the words of the statute. And the defendant is shown to have been employed, at the time the act was done, in the postoffice department.

Is it essential that the letter, charged to have been embezzled, should be described by stating to whom it was directed, and by whom it was written. This description is generally given where it is practicable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A postmaster, or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the

evidence of his guilt. Where the act is done deliberately, as may be presumed to be the case, generally, when done by a postmaster, there is not one instance in a thousand, perhaps, where the letter is not destroyed. And if a particular description of it be essential to the validity of the indictment, a conviction under this, or any other similar provision of the act, would be hopeless.

Where a letter is thrown into the mail to decoy a postmaster, by an agent of the department, who opens and examines the mail immediately after it leaves the office, the letter may be described with the certainty required by the counsel; but such certainty could not be obtained in any other case where the violated letter was not recovered. The security of individuals does not seem to demand this particular description of the letter; and to require it would, in most instances, defeat the great purposes of justice.

The case of *The United States v. Mills*, above cited, was brought before the Supreme Court by a division of opinion of the judges of the Circuit Court, on a motion in arrest of judgment. There were two counts in the indictment. The first count charged that the defendant at, &c., did procure, advise, and assist to secrete, embezzle, and destroy a mail of letters with which the said was intrusted, and which had come to his possession, and was intended to be conveyed, by post, from Pittsburg, in the district aforesaid, to Fayetteville; also, in said district, containing bank notes, &c. The second count was framed in the same words as above, excepting the writer of the letter, and the person, to whom it was directed, were stated, adding after the words, "bank notes, amounting, in the whole, to sixty dollars, of a description, to the jurors aforesaid, unknown, and of the issue of a bank to the said jurors, also, unknown," &c.

The Court say—"the second count in the indictment sets out the particular letter secreted, embezzled, and destroyed, containing bank notes amounting to sixty dollars." And they remark, the offence here set out against the mail carrier, is substantially in the words of the statute, repeating the words above cited.

The Court do not pronounce either count defective, but say the charge is set out with sufficient certainty to authorize a judgment. The main point was, whether the guilt of the principal was sufficiently averred to convict the defendant, for having advised and procured him to do the act.

By the English postoffice act the stealing of a letter from the mail, by a person employed by the postoffice, is made a high misdemeanor, and is punished by fine or imprisonment. And an indictment there for that offence describes the letter as "a post letter." The person to whom it was directed, or by whom it was written, is not stated; nor the place where mailed, or to which it was destined, nor the route on which it was to be conveyed. It is stated to be the property, and, also, its contents, of the Postmaster General, but this is in virtue of an act of Parliament of the 7 W. 4; and 1 Vict. c. 36, s. 40.

It is insisted that this count does not show that the letter was, in fact, in the mail. It is enough that the letter is charged "to have come to the possession of the defendant, and was intended to be conveyed by post," in the words of the statute.

Is it necessary, particularly, to describe the bank notes.

This in some cases may be practicable, but in most cases it is not. In the first count of the indictment against Mills the notes were not described. Nor were they described in the second count, except as amounting to sixty dollars. They were represented to have been issued by a bank unknown to the jurors, and of a description unknown.

In an indictment for larceny, it is essential to the validity of the charge, that the name of the owner of the property should be stated. And if the fact of ownership be mistaken, it is ground for the acquittal of the defendant. As before remarked, by statute in England, the property of the bank notes, or other articles contained in a letter stolen from the mail, is laid in the Postmaster General. But this, it is presumed, could not have been done before the statute.

Why is it necessary that the property in these notes should be laid in any person in the indictment? It is difficult to perceive any good reason for this form. Under our statute it is believed not to have been done generally, if at all.

The taking of these notes does not constitute the principal offence. It adds greatly to the enormity of the act, and increases the punishment. But the main offence is the violation of the sanctity of the mail, by an individual who had sworn to protect it.

In 1 Chitt. Rep. 698, it is laid down, that where the offence can not be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of. As in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; stating them as "divers goods," has been holden sufficient.

Pursuing the words in the statute is sufficient, in describing an offence, unless there are generic terms, in which case it is necessary to state the species, according to the truth of the case. Archb. Cr. Pl. (edt. 1840) 47.

Under the English form it is not necessary to describe the bank note, or bill of exchange, contained in the letter stolen. Archb. Cr. Pl. (edt. 1840) 211. A bill of exchange, for the payment of ten pounds, is stated in the precedent, and no other description is given. The value of the article inclosed need not be alledged in the indictment, or proved on the trial.

This, however, is under the act of 7 Will. 4, and 1 Vict. c. 36, sec. 40, which provides, "it shall not be necessary, in the indictment, to alledge, or to prove upon the trial, or otherwise, that the post letter bag, or any such post letter, or valuable security, was of any value."

It was held by the Circuit Court of Ohio, (*United States v. Nott*, 1 McLean's Rep. 504,) that some evidence of the value of the article inclosed in the letter must be given. That "it was clearly not necessary to prove the hand writing of the presidents and cashiers, whose signatures appear on the face of the notes, by one who has seen them write." But this was a case where the notes were described in the indictment; of course proof of them would be required. But from this, it by no means follows that it is necessary to set out the notes particularly in the indictment.

The Court, in the above case, further remark, that a counterfeit note being of no value, or a note on a bank which never existed, or is wholly insolvent, would not constitute the offence under the statute.

That the rights of the accused are in no sense abridged or jeopardized by a general description of the notes—"as bank notes, for the payment of money," as contained in the present indictment, strongly appears from the British precedent. For the principles of the common law are less departed from in that country, in the administration of justice, and, especially, of criminal justice, than in any other.

And although the present form of an indictment like this has been framed under the sanction of an act of Parliament, it is considered of no less weight of authority on that account. If the form of the indictment had been adopted by the rules or decisions of their courts, it would have been regarded as no slight evidence of the law. And the principle having received the sanction of the Legislature, as well as of the courts, the au-

thority is stronger. It is certainly stronger as regards the safety and propriety of the form.

That the count does not state the value of the notes, or that they were of any value, was not objected in the agreement on the motion to quash, nor was it considered by the Court. This is, perhaps, the strongest objection to the count. The notes are described, generally, as bank notes for the payment of money, but if, as suggested in the above case against Nott that the notes must be proved to be of some value, it is doubtful whether some value should not be averred.

If the notes must be of some value, the notes of an insolvent bank, which are wholly worthless, are not within the statute. If this position be correct, the notes of insolvent banks form an exception, and the rule is, where an act prosecuted criminally may be within an exception, which makes it an innocent act, the defendant should be shown not to be within it. And if the notes in this case, being on insolvent banks, could add nothing to the criminality of stealing the letter, it would seem that the indictment should show that they were not bank notes of this description, by an averment that they were of some value. But, as before remarked, at the trial, this point was not raised in the argument nor decided by the Court.

As to the third objection that no crime is technically charged in this count, it is sufficient to say the count charges, in the very words of the statute, that the defendant did secrete and embezzle one letter, &c. The word embezzle is a significant word; it is used in the statute and means to steal by breach of trust, which is a most appropriate term, and more descriptive of the offence than any other.

It is objected, in the fourth place, that there is no averment that the act was done by the defendant, while acting as post-master at Carrolton; and that if the act had been committed at any other place, he is not punishable under this count.

There is no foundation for this exception. The count charges that the defendant did secrete and embezzle one letter containing divers bank notes for the payment of money; the said Charles Lancaster, being at the time of such secreting and embezzling as aforesaid, then and there employed in one of the departments of the postoffice establishment, to wit—a postmaster at Carrollton, &c.

In the fifth and last place it is objected that an acquittal or conviction on this count could not be pleaded in bar to a future indictment, for the same offence, more technically described.

This objection cannot be sustained. The true test whether an acquittal could be pleaded is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *Rex v. Frances Clark*, 1 Brad. & Bing. 473. *Rex v. Sheen*, 2 Car. & Payne 634. *Rex v. Emden*, 6 East. 437.

An acquittal upon an indictment for burglary and larceny, may be pleaded to an indictment for a larceny of the same goods; because on the former indictment the defendant might have been convicted of the larceny. 2 Hale, 245. *Rex v. Vandercomb*, 2 Leach. 716. Where the offence is alledged in the two indictments to have been committed at different times or places, they may be identified by a general averment, that they are one and the same offence.

But if one of the indictments appear to be for the murder of a person unknown, or for the larceny of the goods of a person unknown; and the other for the murder of J. N., or for larceny of the goods of J. N., a plea may aver that the person so described as a person unknown, and J. N. are one and the same person and not different persons. And so in every other case, however different on the face of the two indictments the facts may be charged, yet, if they relate to the same offence, a formal

acquittal or conviction may be pleaded. 2 Hawk. Rep. 6. Ch. 35, sec. 3. *Rex v. Wildey*, 1 M. & S. 183.

On these principles there can be no doubt that an acquittal or conviction on this count, could be pleaded in bar to an indictment for the same offence.

The fourth count, to which objection is made, charges that the defendant, &c., "did then and there feloniously steal two bank notes for the payment of money, to wit—a bank note issued by the Bank of Louisville, in the State of Kentucky, for the payment of two dollars, and of the value of two dollars; and one other bank note issued by the Franklin Bank of Cincinnati, in the State of Ohio, for the payment of one dollar, and of the value of one dollar, out of a certain letter, which came to the possession of the said Charles Lancaster, at the time the said letter came to his possession, as aforesaid, and at the time of stealing of the said bank notes out of the said letter, as aforesaid, being then and there employed," &c.

This charge is framed under the 21st section of the postoffice act above referred to, which provides, "if any person employed as aforesaid shall steal or take any of the same, that is, bank note or other article of value, named in the section, out of any letter, packet, bag, or mail of letters, that shall come to his or her possession, such person shall, on conviction," &c.

The objections to this count are that the letter is not sufficiently described, and that it does not appear to have come into the possession of the defendant to be conveyed by post.

It will be observed that this count does show that the letter came into the possession of the defendant as postmaster of Carrolton. It is not necessary that it should have come to his possession to be conveyed by post. The objection as to the statement of the letter is sufficiently answered in considering the same exception made to the second count.

An objection is made to the fifth count which, in no respect, varies from the fourth, except the defendant is charged in the fifth with having unlawfully taken two bank notes, &c. The words of the statute are, *shall steal or take, &c.*

This count, it is insisted, charges no crime. It charges the taking to have been unlawful. Now, the word unlawful is not in the statute, but the punishment provided can only have been intended by the statute where the taking was unlawful, that is, in violation of law. It could not mean a lawful taking.

This offence, though one of high magnitude, is only a misdemeanor. It is not necessary to charge that there was a felonious taking. We think the count is sufficient.

The sixth and last count objected to, charges that the defendant did "steal out of a mail of letters," that then and there came to his possession, &c. This count, with the above exception, is the same as the preceding count. The words of the statute are, "any person employed as aforesaid, shall steal, or take, any of the same out of any letter, packet, bag, or *mail of letters, &c.*" This count charges the defendant with stealing out of a mail of letters, &c., one bank note, &c.; and we think it contains the requisite precision and certainty. Indeed the counts are all drawn with a commendable brevity and precision.

The motion to quash the indictment being overruled a jury was called and sworn.

Mr. Brown, a traveling agent of the postoffice department, being sworn, stated that, being desirous of testing the honesty of the postmaster at Carrolton, repeated losses of letters containing money having occurred on that route, on the 25th May, 1840, a letter was written by the postmaster, at Pittsfield, signed D. A. Clarkson, and directed to James S. Bellsinger, at Carrolton, Greene county, Illinois, which on its back purported to be postmarked, at Salem, Iowa Territory. Seventy

three dollars in bank notes—seventy of which were counterfeit—two dollars on the Bank of Louisville, Kentucky, and one dollar on the Franklin Bank of Cincinnati, both of which notes, he believes to have been genuine, were inclosed in the letter. It was accompanied by a postbill, with the postage marked seventy five cents—paid. The letter was put into the mail at Greggsville, and was received at the Carrolton office the 26th May. On the 28th May he went into the office, looked over the letters, and saw the above letter in the pigeon hole, under the letter B.

The witness returned to Springfield where he resided, and in about eight or ten days, when Mr. Abell, postmaster at Chicago, then at Springfield, wrote to the postmaster at Carrolton, inquiring for the above letter, and requested him to forward it to Springfield if in his office. No answer was received nor was any letter forwarded as requested. The witness, in company with Mr. Abell, went to Carrolton; arrived there in the evening, and Mr. Abell, as he testified, called at the office for the above letter. He first inquired for a letter for himself; finding none, the postmaster answered the other inquiry by saying that there was no such letter in the office nor had there been in it any such. The postmaster then inquired whether he had not written to him from Springfield about the letter, and being answered in the affirmative, he observed that he intended to write him but neglected to do so.

The next morning Mr. Brown went into the office, and on looking over the account of mails received, he found that an entry had been scratched out made the 26th May; and another entry of mails received from Jacksonville, in the same place, written over it. This entry had been first made in a line below the entry which had been scratched out, and afterwards erased.

On a close examination of the entry scratched out, Mr. Brown could perceive pretty distinctly the letters S—l and m, and the letters I. T., from which it appeared, to him, the word Salem had been first inserted, and the letters I. T., designating Iowa Territory. On the account of mails received the postbill is copied, which states the place where the letter was mailed, the date, and the amount of postage paid or unpaid. In the above entry the date and the amount of the postage had, also, been scratched out, and other figures inserted. Mr. Brown thought he could perceive some parts of the figures, 75 not having been entirely scratched out or covered by the new entry. He says, since this time, the traces of the word Salem, and the others, have been eradicated by scratching.

Mr. Brown inquired of the defendant who made the alteration, and he admitted that he had made it, but gave no satisfactory explanation respecting it. Mr. Brown then observed that if he had seen that entry before Lowndes was arrested, he should have had him examined.

Mr. Chester, a witness, confirmed the statement of Mr. Brown as to the alteration of the entry or transcript of mails received. The letters I. T., and some of the letters in the word Salem, were perceivable when he first saw the entry. The entry was then different from what it now appears; the scratching out has been completed. He saw the lost letter in the office, but cannot, with certainty, state the last time he saw it there.

Mr. Lowndes, a young man, who was an assistant in the office, states that the defendant took the letter, opened it, gave the witness thirty eight dollars of the money inclosed, and retained the balance himself. This was done on the afternoon of Sunday, succeeding the receipt of the letter.

In his defence, the defendant proved, by several witnesses, that he had maintained a good character in the county. That

The United States v. Lancaster.

he had risen by his own merits, from a humble employment in life to be postmaster, and recorder of the county, having been elected to the latter office by the people, and that his character for honesty, before the present accusation, was as good as that of any other man.

Mr. Carlin stated that he thinks the defendant was in the country, with his friends, on the Sunday on which Lowndes swore he took the letter. But the witness has no other ground for this impression, than that, during the day, he did not see the defendant in town. He did not see him leave the town or return to it, but, he thinks, as his residence is near the postoffice, he should have seen him sometime during the day had he not been absent.

Mr. Terry stated that Lowndes, when about being arrested, on the charge of the defendant, for taking this letter, wanted him to swear that he loaned Lowndes twenty dollars, which had been seen in his possession, and how he obtained it he could not prove.

Mr. Avery saw Lowndes' pocket book which contained ninety eight dollars. Among these was a twenty dollar note on the Valley Bank of Virginia, and a one dollar note on a bank in Cincinnati. Notes of these descriptions, the former being a counterfeit, were inclosed in the stolen letter.

Mr. Adams heard Lowndes say that if they made him tell how he came by his money, he would make Lancaster, the defendant, tell how he came by his.

Mr. Bowyer stated that he was in the office when a man (Mr. Abell) inquired for the letter to Bellsinger, when the defendant asked Lowndes whether there had been such a letter in the office, and that Lowndes replied there had been such a letter, but he had given it to Bellsinger.

There was other evidence of the statements of Lowndes with a view to discredit him.

The Court, in their charge to the jury, adverted to the prominent points in the evidence, and, particularly, to those facts about which there seemed to be no controversy. These were that the letter charged to have been stolen was in the postoffice at Carrolton, the denial of the defendant that such a letter had been in the office, and the alteration of the record of mails received, which he admitted had been done by him; and, also, the traces of the original entry, that had been scratched out, as sworn to by Mr. Brown and Mr. Chester. That to these facts the defendant had only offered his former good character, and that the letter might have been taken by his assistant, Lowndes. That the statements of Lowndes, under the circumstances, should be received with great caution, and, where uncorroborated, should have little weight. The law made him a competent witness, though by his own statement he was an accomplice. If the jury believed his statement, there could be no doubt of the defendant's guilt. But it was for them to weigh the testimony and give credit only where it was due.

That they might consider the case independently of the statements of this witness, and then, in connection with his evidence, if they entertained reasonable doubts of the defendant's guilt, it must lead to his acquittal. But if, on the other hand, these doubts do not exist they were bound to convict. That they had a right to find the defendant guilty or not guilty of any one or more counts in the indictment. And upon the whole, that looking into the evidence with great care, and under a due sense of the high importance of the case, they would return such a verdict as the law and evidence required.

The jury returned a verdict of guilty against the defendant on three counts in the indictment, which charged the defendant with secreting and embezzling the letter.

A motion was made for a new trial on grounds assigned, which, after due consideration by the Court, was overruled.

Hill v. Smith et al.

In giving their opinion, on this motion, the Court said the evidence on which the jury had rendered their verdict was entirely satisfactory. That, independently of the testimony of Lowndes, the evidence proved the guilt of the defendant, in their opinion, beyond all reasonable doubt.

At a subsequent day of the term the Court sentenced the defendant to ten years confinement in the penitentiary.

HILL vs. SMITH ET AL.

An equity of redemption, at common law, can not be sold on execution.

When a mortgagee brings an action on mortgage bond, obtains judgment, sells the right of redemption, and becomes the purchaser, on the supposition that such an interest can be sold, the equity purchased at the sale merges in the legal estate.

And this principle holds equally, whether the purchase extends to the whole or a part of the mortgaged premises.

It is a general principle, where a greater and a less estate unite in the same person, the latter becomes merged in the former.

Where a contrary intention is shown by the person holding these interests, this effect may not result from the union of these estates.

Mr. *Krum* appeared for the complainant, and Messrs. *Hall* and *Edwards* for the defendants.

OPINION OF THE COURT.

THIS is a bill to foreclose a mortgage. To secure the payment of the residue of the purchase money, the defendant, Smith, executed a mortgage on the tract purchased. After the mortgage money became due the complainant commenced an action, at law, against the mortgagee on the bond, and recovered a judgment. An execution was issued, and the land,

with the exception of one hundred acres, was levied on, and sold for three thousand dollars, leaving a balance on the judgment unsatisfied. To obtain this balance this bill was brought to foreclose the mortgage on the hundred acres not sold on execution.

In his answer the defendant states, that there is a defect in the title, that he paid, at the time of the purchase, fifteen hundred dollars, and the sum of three thousand was collected on the judgment by a sale of the land mortgaged, excepting the hundred acres. That before the judgment, at law, the defendant, Smith, conveyed to the other defendants the hundred acres on which a foreclosure and sale are prayed by the bill. And the defendant insists that by the sale, at law, the complainant has received, with the payment made at the time of the purchase, more than the value of the land with the defect of title. He, also, insists that the above proceeding discharges the mortgagee.

Several exceptions have been taken to the answer, some for impertinence, &c., which need not be stated. We think that the answer admits upon its face the amount unpaid on the mortgage, and the statement of the sale to Howard, &c., by the respondent, can not be held irrelevant, as if not expressly called for by the statements of the bill, it is necessary to show the extent and nature of the interest of the other defendants except Smith. Exceptions overruled. Several questions have been argued, as arising from the face of the bill and answer, which, although made in a somewhat irregular manner, will be here considered.

The first ground taken by the defendants' counsel, is, that the sale and purchase of the defendants' equity of redemption on execution, under a judgment for the mortgage debt, by the complainant, extinguishes the mortgage debt. And to this

the case of *Tire v. Annem*, 2 John. Ch. Rep. 125; *Atkins v. Sawyer*, 1 Pick. Rep. 351; 4 Kent's Com. 157, were cited.

Whether the complainant acquired any right, under the sheriff's sale, may well be doubted. It is clear that at common law an equity of redemption can not be sold on execution. And we believe there is no statute subjecting this interest to execution, nor is it known that the Supreme Court of Illinois have so held.

This point was examined in the case of *Piatt v. Oliver and others*, in this volume, page 267.

The above authorities seem to consider the purchaser of the equity of redemption, as resting upon that right only, whether a mortgagee or a stranger make the purchase. And that the payment of the mortgage money discharges the lien of the mortgage. This is undoubtedly the case where the purchaser is a stranger. On the supposition that the right of redemption may be sold on execution, the purchaser possesses himself of the right to redeem, and, on the payment of the amount due the mortgagee, the mortgage is discharged. But in this case the mortgagee was the purchaser, and the payment is to himself. Is the effect of such a purchase to discharge the mortgage and give the purchaser a mere equity? What is the nature of this equity? It is a right of redemption while it remained in the mortgagor, or when sold to a stranger; but can it be so considered in the hand of the mortgagee?

Prior to the purchase the mortgagee had the legal title, and by the purchase he holds this outstanding equity. The equity, then, and the legal title unite in the same person, and where this is the case the equity merges in the legal title. This is clearly the case, unless the party, in whom they unite, evinces a determination to keep them separate, or it is his interest to keep them so.

This doctrine is examined by Sir William Grant, in the case of *Forbes v. Maffatt*, 18 Ves. 389. He says—"it is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate, and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist, at law, and sometimes preserve it where, at law, it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances, it is with reference to the party, himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done, by him, to keep it on foot."

This is the general doctrine on the subject. *Lord Campton v. Oxander*, 2 Ves. Jun. 263. 4 Br. Ch. Cases, 398. *Gardner v. Astor*, 3 John. Ch. Rep. 53. 2 Fonbl. 162, ch. 6, sec. 8.

If the equity of redemption could be sold, by the purchase of it, the complainant vested in himself, as mortgagee, the equitable and legal titles to the land sold; and there can be no reason why the equitable should not merge in the legal title.

There can be no possible interest in the complainant to keep these titles separate, and by taking the deed, and other acts, he has shown a disposition to unite them.

No objection is perceived to the application of this doctrine to the purchase of a part of the mortgaged premises as well as the whole. The purchase, in this case, extended to the whole tract, except the hundred acres which had been sold. In *Wis-cot's case*, 2 Coke's Rep. 61, it is laid down—"if the reversion be granted to tenant for life, and another in fee, the estate for life is extinct for a moiety; for tenant for life can not purchase, or get the reversion or remainder of the same land, but the

estate for life will be merged, having regard to the estate which he hath gotten in the reversion." So far as these estates united in the same person there was a merger. And so in the case under consideration. The legal estate of the mortgagee extended to the whole tract covered by the mortgage; the purchase of the equity extended to the whole except the hundred acres. To the extent, then, of the union of these two titles, in the complainant, there was a merger of the equitable right, and his title, to the extent of the sale, may be considered as valid. Whether the right of redemption was liable to be sold, at law, on execution, in this State, the Court do not decide—they are inclined against it.

The second ground taken by the defendant, is that he has sustained damages by the proceeding of the defendant, and the defect of title, which raised an equity against the demand of the complainant.

As it regards the suit by the mortgagee, on the bond complained of, it was no more than prosecuting a remedy in a legal form. The defect in the title is not set up in such a form as to authorize the Court, in a suit like this, to inquire into the amount of damages sustained, if any. The complainant is liable on his warranty, and to that the defendant must resort, unless he shall make a case different from the one set up in his answer.

Should the complainant, for the better securing of his title, ask to have set aside the sale of the equity of redemption, in order that the entire tract may be sold under the mortgage, the Court will, probably, permit the necessary amendment of his bill to be made.

Some objection is made as to Smith, the mortgagor, being made a party. He was clearly a necessary party.

The cause will be continued for final hearing at the next term.

Executors of Dennis v. Rider and others.

EXECUTORS OF DENNIS *vs.* RIDER AND OTHERS.

The surety by giving notice to the creditor, and requesting him to sue the principal debtor, who is in failing circumstances, does not release himself, though the principal should become insolvent.

The relief of the surety, under such circumstances, is in equity.

Where the obligee changes the contract, by giving longer time, &c., the surety is discharged. And this matter may be set up at law.

In such a case the discharge of the surety does not depend on the insolvency of the obligee, but on the alteration of the contract

But the solvency or insolvency of the principal debtor can better be ascertained in chancery, where his answer may be required.

The surety, on the payment of the debt, is entitled to be substituted to all the rights of the creditor.

This does not mean that the original obligation, which is discharged by the payment, shall be assigned to the surety; but mortgages, &c.

Messrs. *Robbins* and *Welles* appeared for the plaintiffs, and Mr. *Logan* for the defendants.

OPINION OF THE COURT.

THIS action is brought on a promissory note. The defendants pleaded nonassumpsit; and four special pleas, substantially, that Pierson was the security of the other defendants. That he gave notice to the agent of the plaintiffs, that the principals were in doubtful circumstances, and requested him to commence suit. That his co-defendants were then solvent, and able to pay the amount, but the plaintiffs neglected to bring suit until, &c., at which time their co-defendants became insolvent. To these pleas the plaintiffs' counsel demurred.

In this State there is an act entitled "an act for the relief of sureties, in a summary way, in certain cases," approved 24th March, 1819, which provides that the surety may give notice to the promisee or holder of the note, in writing, forthwith to

sue, &c., and if he shall fail to do so he shall forfeit the right to recover from the surety.

The pleas are not filed under this statute, but at common law. It is not pretended that the notice to the holder of the note was given in the manner required by the statute.

To sustain these pleas the case of *Pain v. Packard*, 13 John. Rep. 173, is relied on. In that case it was said, if an obligee, or holder of a note, who is requested by the surety to proceed without delay and collect the money of the principal, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be exonerated. That case was decided without argument, and no authority was referred to except a decision in 10 East. Rep. 34. In the case in East. there was a plea filed similar to the pleas in this case, which was not demurred to. Lord Ellenborough said—the only question is, whether the laches of the obligee, in not calling upon the principal so soon as they ought to have done, if the accounts had been properly examined from time to time, be an estoppel, at law, against the sureties. I know of no such estoppel at law, whatever remedy there may be in equity.

The defendants' counsel, also, relies on the case of *King v. Baldwin et al.*, 17 John. Rep. 384. That was an appeal from the decision of the Chancellor, before whom relief was asked by a defendant, against whom judgment, as surety, had been obtained. He pleaded to the suit, at law, that the plaintiff neglected to bring suit, although specially requested, on the ground that his principal was about to become insolvent. The Court overruled the evidence under the plea. A motion was made for a new trial, but not prosecuted. And on the ground that the promisee might have recovered from the promisor, had the suit been prosecuted as requested, the bill was filed praying relief.

Chancellor Kent dismissed the bill on the ground that the complainant was entitled to no relief. He examined the doctrine at large, and maintained that there could be no relief at law. And that the circumstances of the case entitled him to none in equity.

In the Court of Errors Judge Spencer reviews the opinion of Chancellor Kent, and reaffirms the doctrine in the case of *Paine v. Packard*. The judges who decided that case were Thompson, Ch. Justice, Spencer, Vanness, Yates and Platt.

The Court of Errors being equally divided, the presiding officer reversed the decision of the Chancellor.

Platt, Justice, changed his opinion, being convinced that the decision in *Paine v. Packard* was erroneous. Yates concurred with him, and, if I mistake not, Vanness.

In the case of *The Bank of Steubenville v. Administrators of Carroll*, 5 Hammond, 207, the defendant pleaded that he signed as surety, &c., to which the plaintiff demurred, and the Court decided that, if any change be made between the creditor and the surety that it discharges the surety, and that his defence may be set up at law as well as in equity.

A case is cited in 14 Wend. 165, in which it was held that a notice to the agent of the promisee to prosecute the principal, by the surety, was sufficient.

The rule in New York may be considered, perhaps, as settled by the decision above cited in the Court of Errors. A decision in that court establishes the law for the State of New York; but it is believed that, beyond the jurisdiction of that State, the decisions of the Supreme Court are chiefly consulted as authority.

The rule is well established that where an indorser has become fixed by demand and notice, if the holder of the bill shall, for a valuable consideration, agree with the drawer, or acceptor, to give him more time, it discharges the indorser.

Executors of Dennis v. Elder and others.

McLemore v. Powell, 12 Wheat. Rep. 554. *Bank of the United States v. Hatch*, 1 McLean's Rep. 90. Same case, 6 Peters' Rep. 250. This is upon the ground that the surety has a right, at any time after the bill becomes payable, to pay the holder, and be substituted to all his rights. Not that he is entitled, as has been ruled by several courts, to an assignment of the bill, because that is discharged by the surety, but he is entitled to all the collateral securities, such as mortgages, pledges of personal property, &c., which the creditor may hold. But if the creditor make a contract to extend the time of payment, this suspends this right of the surety, and he is, consequently, released. And so if the creditor, without the consent of the surety, changes the nature of the obligation of the principal in any respect. In these cases relief may be had at law. The question is not whether the surety has, in fact, been injured, but whether his right to pay the bill or note has not been suspended; or, whether the contract has not been materially altered by the creditor and principal. But, until the case of *Paine v. Packard*, in 13 Johnson, and *The Bank of Steubenville v. Administrators of Carroll*, 5 Ham., no case has been found where relief to a surety beyond this has been given at law.

The case of *Paine v. Packard* introduced a new rule. It was so considered by many of the most learned and able men, who gave opinions in the case of *King v. Baldwin*, in 17 Johnson. And this rule is essentially different from the one which, prior to that time, had been recognized at law. That was founded upon an essential change of the contract, either as to the time of payment, or the acts to be done, without the assent of the surety. But the case of *Paine v. Packard* held, if the creditor neglected to prosecute the principal, on being required to do so by the surety, and the principal proved to be insol-

vent, the surety was discharged. And this without any indemnity offered by the surety, as to the costs incurred.

Now, the rule has been, at law, that the creditor, beyond demand and notice, is not bound to active diligence. And there seems to be reason in this. For the surety confided more in the principal debtor than the creditor. The creditor, until the surety became bound, was unwilling to trust the principal. Now, if the creditor or the surety must be subjected to inconvenience and expense on account of this confidence, should it not fall upon the surety? He was the active agent in inducing the contract, and justice would seem to require that to save himself from loss he should again become active. And this is an established principle. In pursuance of former decisions he could pay the money and claim all the rights of the creditor, or he could file a bill, and, on the special circumstances of the case, ask the Court to compel the creditor to bring suit. The New York rule, however, gives, at law, the same effect to a notice as results from a decree under the former rule.

Now, the law having established the rule, that a suit in chancery is necessary, it would seem not to be advisable to change it on mere notions of policy or convenience. But, if this question were now open, it might be considered a matter of doubtful policy to adopt the New York rule. There are many matters which, under that rule, it might become necessary to investigate, and which more safely and properly might be examined in chancery than at law. Complicated matters of fraud, connected with the circumstances of the principal debtor, might arise; the time of his insolvency, &c., which could not be well inquired into, or understood, without his answer, and his answer can only be required in chancery.

In a plain case where the principal debtor was solvent when the notice was given, and afterwards became insolvent, it

would seem the New York rule would be salutary. But such a case, it is presumed, would seldom occur.

The former rule rested upon the change of the contract. This was a matter of fact and of law, which the jury, under the instructions of the Court, could determine. But whether the surety had been injured by the neglect of the creditor to prosecute the principal debtor, must often give rise to questions which can only be investigated in chancery. The old rule, therefore, seems to be safer and better than the new one. And this is, no doubt, the reason why the new rule has had so limited an influence.

Mr. Justice Story, in his *Equity Jurisprudence*, 1 vol. 592, sec. 639, says—if the debt is due, and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility. In cases of this sort, he says, there is not, however, any duty of active diligence incumbent upon the creditor. It is for the surety to move in the matter. But if the surety requires the exercise of such diligence, and there is no risk, delay, or expense, to the creditor, or a suitable indemnity is offered against the consequences of risk, delay, and expense, it seems that the surety has a right to call upon the creditor to do the most he can for his benefit, and if he will not a Court of Equity will compel him. *Nesbit v. Smith*, 2 Bro. Ch. Rep. 579. *Hays v. Ward*, 4 John. Ch. Rep. 123.

In the 322d page, sec. 327, of the same volume, Mr. Justice Story says—whether the surety can thus compel the creditor to sue the principal or not, he has a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor, as to all securities held by the latter for the debt, and to have the same benefit, that he would have therein.

Longthorne v. Swinburne, 14 Ves. 162. *Wright v. Mosley*, 11 Ves. 12, 22.

In the case of *Wright v. Simpson*, 6 Ves 734, Lord Eldon admits that the surety might have a right to compel the creditor to proceed against the debtor under some circumstances. But, then, in such a case, the surety is compellable to deposit the money in court for the payment of the creditor. So that, in fact, it is but the case of an indirect subrogation to the rights of the creditor, upon a virtual payment of the debt by such a deposit.

A surety in a bond will be released when the obligee does some act which varies the terms of the original contract; but forbearance to sue is not such an act, and if the surety think otherwise, he should apply to the Court of Equity and compel the obligee to sue. *Burn v. Poang*, 3 Dessau. Rep. 604.

The indulgence granted to a principal, which is to discharge from his engagement, must be of that kind whereby the value of the contract is changed, or, whereby the creditor, without the consent of the surety, and by his own act, puts it out of his own power to enforce the payment of the debt by the principal. It does not mean a mere forbearance to sue the principal, which a Court of Equity, on application of the surety, might direct him to do, on pain of foregoing his claim against the surety. *Buchanan v. Bordley*, 4 Har. and McHen. 41.

A surety apprehending danger from the delay of the creditor, may come into this court and compel the creditor to sue the principal debtor, on giving an indemnity against the consequences of risk, delay and expense. *Hayes v. Ward*, 4 John. Ch. Rep. 129.

To require the creditor to sue the principal on a mere notice of the surety, without an indemnity, when the surety could not be included in the suit, would seem to be unreasonable. Upon the whole we think that the case of *Paine v. Packard*

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is not sustained by authority, and, on principle, it is not recommended by such considerations of policy, as should lead to the adoption of the rule sanctioned by it. We think it safer to follow the old rule, which is well established in practice.

The demurrer to the pleas is sustained. Judgment for the plaintiff, with stay of execution, until the next term, by consent, &c.

SHURLDS vs. TILSON AND PITKIN.

There are two modes of giving notice of the dissolution of a copartnership, which will discharge an outgoing partner.

One is express notice, by circular or otherwise, to those with whom the firm has had dealings.

The other by publication in some newspaper of general circulation.

This latter notice is conclusive on those who had not had dealings with the firm. And as to those who have had dealings with the firm, such a publication would be received as evidence to the jury, who must determine, from all the circumstances of the case, whether the party had notice.

A person who deals with an individual, and exercises a power to bind another, should make some inquiry into his right to do so.

Messrs. *Davis* and *Forman* appeared for the plaintiff, and Messrs. *Baker* and for defendants.

OPINION OF THE COURT.

This action is brought by the plaintiff, as assignee of certain bills or promissory notes, which purported to be signed by the defendants, and dated the 8th of May, 1839, and the 23d of July following.

The defendants were partners in merchandizing, at Quincy, in this State, until the 19th April, 1839, when their partner-

ship was dissolved; of which notice was given at the above date, in a newspaper published at Quincy. Both the defendants resided at that place.

The plaintiff is a citizen of St. Louis, in Missouri. From the indorsements on the bill it would seem that this suit is brought for the benefit of the Bank of St. Louis. It is not pretended that either the bank or the plaintiff had any dealings with the defendants during their partnership. And the only question is, whether such notice of the dissolution of the partnership has been given to exonerate Tilson from liability on the bills. They were drawn by his late partner, Pitkin, and signed in the name of the partnership.

There are two modes of giving notice of the dissolution of a partnership, which shall put it out of the power of either partner to bind the other.

The first is a special notice, by a circular or otherwise, of the dissolution, to those persons with whom the partnership had had dealings. This is the safer and more advisable course. And until this notice be given, either expressly or constructively, the partnership may be still bound after the dissolution. And the partners are bound, where the act purports to be a partnership act, without notice, whether it be done with a customer or a stranger.

The second mode of giving notice is by a publication in a gazette. This publication of the dissolution is admissible as evidence, but Mr. Gaw, in his Treatise on Partnership, page 280, says—that it is of little avail, unless it be shown that the party entitled to notice was in the habit of reading the gazette. *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371. *Leeson v. Halt*, 1 Starkie, N. P. C. 186. He says, indeed, that an advertisement in a common newspaper is not even admissible, without proof that the party took in the paper. In the case above cited, from 1 Starkie, Lord Ellenborough said—that he would

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receive evidence of the advertisement in the gazette, but that, unless it were proved that the party was in the habit of reading the Gazette, the evidence would be of little avail. And his Lordship was of opinion, that the advertisement in the Times, was not admissible at all without proof that it was taken in by the party. From these remarks it would seem that the Gazette was the paper in which such notices usually appeared, or were required to be published, and, therefore, a notice published in that was admissible in evidence, on a different principle from a notice in the Times.

In the case of *Jenkins v. Bizard*, 1 Starkie, 418. The notice in the Gazette being read, the defendants proved that a similar advertisement had been inserted once in the Morning Chronicle, and, also, that the plaintiffs took in the latter paper. Lord Ellenborough was of opinion that it was admissible, and referred to a case where a party was sought to be affected with notice of an advertisement contained in a weekly provincial paper; in that case the paper was not only delivered at the house, but the party was seen to read it. Upon the whole his Lordship submitted the evidence to the jury, and informed them that it was for them to say whether, under all the circumstances, the plaintiffs had notice. He, at the same time, remarked—it would be a more prudent course to send circulars to all with whom the parties had dealings.

The Court of King's Bench, however, have recently decided, in the case of *Wright v. Pulham*, 2 Chitt. Rep. 121, that notice in the Gazette, is notice to all the world of the dissolution of a partnership. In that case it did not appear that the party had had actual notice of the dissolution. This decision conflicts with some of the nisi prius decisions above cited, and of course overrules them. And from this decision the law seems to be now settled in England, although the report of the case is very short and unsatisfactory, that a publication

in the Gazette is sufficient notice of the dissolution of a partnership. And that the question there now is, not whether notice was, in fact, given to the party, but whether it was published in the Gazette. It is known that newspapers are sold in London by the carriers, and not delivered to subscribers as in this country. This, however, can make no difference as to the publication of the notice.

In the case of *Lansing v. Ten Eyck*, 2 John. Rep. 300, it was held that a notice of the dissolution in the public papers is conclusive upon all persons who have had no previous dealings with a copartnership. But as to such persons as have had dealings with a copartnership, it is not so to be considered, unless, under the circumstances, it appears satisfactory to the jury that it operated as a notice. *Bristol v. Sprague*, 7 Wend. Rep. 423. *Graves v. Merry*, 6 Cowen's Rep. 701. 6 John. Rep. 147, 148. *Mowatt v. Howland*, 3 Day's Rep. 353. *Martin v. Walton*, 1 McCord's Rep. 16.

Prudence requires, when an individual by his act assumes the right to bind another, that some inquiry should be made into his power to do so. And even to a stranger, and especially a bank, to whom the bill was negotiated. It would seem not to impose an unreasonable diligence to inquire whether a partnership, which formerly existed, be still subsisting. The Court instructed the jury that if they shall find there was, in good faith, a dissolution of the copartnership between the defendants, and that notice was published of the same, on the 19th of April, in a newspaper of general circulation, at Quincy, it was sufficient to discharge Tilson from liability in this action.

The jury assessed damages against the other defendant on default, and found in favor of Tilson.

Bayard v. Lathy.

BAYARD vs. LATHY.

A letter written within a reasonable time before, or after, the date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance.

An authority to draw several bills of exchange, payable at specified periods, with an assurance that the bills should be paid, is an acceptance to the person who takes the bill on the credit of such an authority.

Messrs. *Cowles* and *Krum* appeared for the plaintiff, and Mr. ——— for the defendant.

OPINION OF THE COURT.

THIS was an action of assumpsit against the defendant, as acceptor of two bills of exchange, for \$1,000 each, dated Dec. 13, 1838, drawn on the defendant, in favor of plaintiff, at Pittsburg, where plaintiff resides, by one James Gonsalis.

Issue was joined on the defendant's plea of nonassumpsit, and a jury impaneled to try the same.

The plaintiff gave in evidence to the jury the following letter, written by the defendant to the said Gonsalis, the drawer of the bills in question:

“UPPER ALTON, Oct. 12, 1838.

James Gonsalis, Esq.:

DEAR SIR—You are hereby authorized to draw on me for one thousand dollars, at ten days sight; for one thousand dollars, at four months; for two thousand dollars, at eight months, and for one thousand dollars, at twelve months, and your drafts shall be duly paid.

Yours, &c.,

H. K. LATHY.”

Proof was made of the hand writing of Gonsalis, the drawer of the bills, and the bills then were permitted to be read to the jury.

It was contended by the plaintiff's counsel before the jury, and the principle so laid down by the Court, that a letter written within a reasonable time, *before* or *after* the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.

In the case of *Mason v. Hunt*, Doug. Rep. 296, Lord Mansfield said: "There is no doubt but that an agreement to accept, may amount to *an acceptance*; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to *accept* his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances between the drawer and the acceptor."

It has been held, however, that this rule only extended to a bill *in esse*, at the time of making the promise. More recent decisions, made upon a careful review of all the adjudicated cases, extend the rule to a bill not *in esse*, at the time of making the promise to accept. *McKim v. Smith*, 1 Hall's Law Journal, 485. *Payson v. Coolidge*, 2 Gallison, 233. Which latter case was affirmed by the Supreme Court of the United States. 2 Wheat. 66. 1 Gall. Rep. 630. *McEvers v. Mason*, 10 John. Rep. 207. 15 Ib. 6.

In the case of *Wilson v. Clements*, 3 Mass. Rep. 1, it is held, "that an agreement to accept a bill when drawn, if shown to a third person within a reasonable time after the agreement was made, and he take a draft on the credit of it, such agreement is a virtual *acceptance*."

In *Pillans and Rose v. Mierop and Hopkins*, Burr. Rep. 1663, it was held that "a promise to accept bills, to be drawn at a future day, was tantamount to an acceptance of them."

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Lord Ellenborough, in *Clark v. Cook*, 4 East. 57, 70, says: "It has been laid down in so *many cases*, that a promise that a bill, when due, shall meet due honor, amounts to an *acceptance*, and that, without sending it for a formal acceptance in writing, that it would be wasting words to refer to books on the subject."

An authority to draw a bill, is virtually an acceptance of the bill, drawn in conformity to it. 9 Mass. Rep. 11. 2 Wend. Rep. 545; *Ib.* 414; *Ib.* 12, 593. *Boyce and Henry v. Edwards*, 4 Peters' Rep. 121. *Parsons v. Armor and Oakey*, 3 Peters, 426. *Townsley v. Surall*, 2 Peters' Rep. 182.

The jury found a verdict for the plaintiff.

SCUDDER vs. ANDREWS AND OTHERS.

Where the action is on a promissory note, a failure of the consideration is a good defence.

And it is immaterial whether the consideration was land, or other property.

A partial failure of consideration can not be set up as matter of defence.

On this point there is a confliction in the decided cases, but the weight of authority requires a total failure of the consideration.

Where the defendants gave their note for a tract of land, which belonged to the United States, and to which the plaintiff could have no title, the defendants may plead the fact, to an action on the note.

A contract in violation of law, or against public policy, can not be enforced.

Messrs. *D'Wolf* and *Chickering* appeared for the plaintiff, and Mr. *Logan* for the defendants.

OPINION OF THE COURT.

THIS action is brought for the consideration of a certain tract of land, sold by the plaintiff to the defendants, situated in Missouri. Defendants pleaded a failure of consideration, by a

defect of title. And, also, that the land sold was a part of the public domain, and had never been sold, or offered for sale, by the United States, and that the contract was against the law, and the policy of the law.

To these pleas the plaintiff demurred.

In support of the demurrer, it is contended that the remedy of the defendant, for any defect of title, is on his contract, or deed, if he received one, and not in this form; that, if there was a covenant of warranty, that constituted a consideration, no fraud being alledged.

And, as it regards the other ground, that the purchase may be considered as a chancing bargain, to which the rule of *caveat emptor* applies, the cases of *Moggeridge v. Jones*, 14 East's Rep. 486, and 3 Campb. 38, S. C., are cited. The action was brought by the drawer against the acceptor. The plaintiff agreed to let a house to the defendant for twenty one years; and, in consideration of £500, to be paid by three bills, to be drawn by the plaintiff, and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted, accordingly, and the defendant was immediately let into possession; but the plaintiff refused to execute the lease. It was urged, therefore, that the consideration had failed. But Lord Ellenborough, and, afterwards, the Court, on a motion for a new trial, held that this was no defence to the action; that the defendant was bound to pay the bills, and might have his remedy on the agreement, for nonexecution of the lease.

That was a case in which there was only a partial failure of consideration. The defendant was in possession of the premises; and the decision was made upon the ground, that the failure of the consideration was partial, and not total. On this point there is some conflict in the authorities, in this country and in England.

Mr. Chitty, in his treatise on Bills, (ed. 1839) 86, says a subsequent failure of the consideration for which a bill or note has been given, either in the whole or in part, when of definite amount, such as the nonperformance of a condition precedent, frequently, between the original parties or their representatives, affords a defence, entirely or partially. And this doctrine is sustained in the case of *Lewis v. Cosgrave*, 2 Taunt. Rep. 2. *Weston v. Downs*, Doug. Rep. 23. *Parser v. Wells*, Cowp. Rep. 118. *Towers v. Barrett*, 1 Term Rep. 183. *Peake* Rep. 38. *Spalding v. Vandercook*, 2 Wend. Rep. 431. But the weight of authority, and especially the modern decisions, is, that unless there has been fraud, a partial failure of consideration can not be set up as a defence. *Morgan v. Richardson*, 1 Campb. 40. 7 East. 483. *Solomon v. Turner*, 1 Stark. Rep. 51. *Tyre v. Gwynne*, 2 Campb. Rep. 346. *Basten v. Butler*, 7 East. Rep. 479. *Obbard v. Betham*, Moody & Walk. Rep. 483. *Gray v. Cox*, 4 Barn. & Ald. Rep. 108. *Laing v. Fidgeon*, 6 Taunt. Rep. 108. *Washburn v. Picot*, 3 Devereux's Rep. 390. *Harlan v. Read*, Ohio Rep. (cond.) 578.

The plaintiff's counsel also cited, to sustain the demurrer, Doug. Rep., *Bree v. Holdek*, 655; and 3 Pick. Rep. 452; *Young v. Triplett*, 5 Litt. Rep. 247; and, also, Sugden on Vend., from 1 to 8. The note, having been given in Missouri, constitutes no objection to an inquiry into its consideration.

The plea sets up a total, and not a partial, failure of the consideration, for which the note was given. And, whether this was land or personal property, can make no difference. Nor is it perceived, in such a case, that it can be important whether the instrument given by the plaintiff to the defendant, as evidence of title, was a deed of conveyance, or an agreement to convey. If the plaintiff had no title or claim to the land, which is asserted in the plea, and admitted by the demurrer, the defendant has a right to set up that fact, as a defence to an action

on the note. Why should he be driven to his action on the warranty, if a warranty deed were given? of which, however, there is no evidence. This would require the defendant to pay the money, and then sue the plaintiff, on his warranty, for the same money, and recover it back again, if the plaintiff should be solvent. Such a course would defeat the ends of justice, and, at best, would be dilatory and expensive. If the defendant had entered into the possession of the premises, and enjoyed them, it would be clear that this defence could not be set up; for, then, there would be only a partial failure of consideration, which would not be a matter of defence.

In the case of *Tillotson v. Graves*, 4 N. Hampshire Rep. 444, where the consideration of a promissory note was a tract of land, which was to be conveyed, but the promisee dying before the conveyance, and being insolvent, it was held that the maker had a right to treat the note as a nullity. Where a note was given for the purchase money of land, the title to which fails, the note can not be recovered. *Rice v. Goddard*, 14 Pick. 293. *Hartwell v. McBeth*, Har. Del. Rep. 363. *Bowles v. Newly*, 2 Blackf. Rep. 364. *Lofland v. Russell*, Wright's Rep. 438.

If the plea alledged, as the ground of failure of consideration, that the plaintiff had failed to convey, merely, it would be clearly bad, as was ruled in the case of *Freligh v. Platt*, 5 Cowen's Rep. 494.

In the case of *Catlett v. McDowell*, 4 Blakf. Rep. 556, which was an action on a promissory note, the third plea stated that the note was given for a part of the consideration of a tract of land, which the plaintiff was to convey to the defendant free from incumbrances, which he had not conveyed. And the fourth plea was similar, except that it stated that the land was to be conveyed in fee simple, by a good and sufficient deed of conveyance, with the usual covenant of warranty, and that it

had not been so conveyed. Replication to the second plea, which was similar to the third, admitting the consideration of the note, as alledged, and stating that, on the 9th March, 1836, the plaintiff had fully complied with his agreement, by executing, and delivering to the defendant, a good and sufficient warranty deed for the land. Held, on general demurrer, that the third and fourth pleas, and the replication to the second plea, were sufficient.

In *Archer v. Bamford*, 3 Starkie's Rep. 175, the bill was given in part consideration for real estate—plea of fraud, and failure of consideration, &c. Abbott, C. J., was of opinion that, inasmuch as the defendant had not repudiated the contract, but had retained possession of part of the premises, and, as consequently, the consideration had not wholly failed, it was impossible to say the bill was utterly void. To the same effect was the decision in the case of *Alloway v. Sibert*, 3 Blackf. Rep. 401. *Spiller and another v. Westlake*, 2 Barn. & Adol. Rep. 150.

In the case of *Greenleaf v. Cook*, 2 Wheat. Rep. 13, the Court say, on the first exception it has been argued, that there is a failure of consideration, which constitutes a good defence to this action.

Without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the Court is of opinion that, to make it a good defence, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something—this Court can not say how much; nor is the inquiry a proper one in a court of law, in an action on the note.

Upon the whole, we think the plea is good, and the demurrer must, therefore, be overruled.

As this decides the case, it is unnecessary to examine the other plea, which sets up, that the contract was in violation of law and public policy.

If the facts sustain this plea, there can be no doubt that it is a good defence. No contract is valid which is made in contravention of the law, or of public policy. Entries upon the public land for settlement, or as trespassers, have been forbidden, by act of Congress, under severe penalties. But whether this law has not been modified, or abrogated by subsequent acts, giving preemptive rights, and encouraging such settlements, is a question which we deem it unnecessary to examine in this case.

GALE vs. NORRIS AND BURR.

Books of accounts are not evidence at common law.

But entries made by a clerk, who is deceased, are evidence.

The original book, however, must be produced. A copy from it can not be received.

To make the entries evidence, they must have been regularly entered, and the books, upon their face, must have the appearance of fairness.

The rule on which this evidence is admitted, applies to all matters of entries made in a regular course of business by a person, before his decease.

Messrs. *Cowles* and *Krum* appeared for the plaintiff, and Mr. *Strong* for the defendants.

OPINION OF THE COURT.

THIS is a motion for a new trial, and it turns upon exceptions taken to a deposition at the last term, which was then, on the trial of this case, admitted in evidence. The motion was continued from that term.

The deposition was introduced to prove a book account of the plaintiff, who resides at New Orleans, where the transactions, which led to this suit, were had, and where the books of the plaintiff now are.

The witness states that he was clerk in the commission house of the plaintiff, at New Orleans; that he has examined the accounts on the book, and the items copied by him, and particularly designated, are correct. They are items advanced by the plaintiff to fit out a vessel, &c., and of which he had personal knowledge. There are some other items charged in gross, to wit: one for \$361, and others, amounting to \$700, which were entered by the book-keeper, who is now deceased. Of these items the witness has no personal knowledge. They are such articles as are usually furnished on similar occasions, and they are set down at the customary prices; but the witness knows nothing of their delivery.

This deposition was permitted to be read as evidence at the last term, and the question now is, whether it should have been admitted.

Books of accounts are not evidence at common law. But books are received as evidence under peculiar circumstances; as, where the entries have been regularly made by a clerk, who is deceased. In many of the States this subject is regulated by statute, and, in others, there have been certain rules established as to the admission of books in evidence, not entirely in accordance with the established law of evidence.

The leading case on this subject is Lord Torrington's, reported in 1 Salk. Rep. 285. In that case it was held that, in an action of assumpsit, where the usual course of the plaintiff's dealings, who was a brewer, appeared to be, that his drayman should come every night to the clerk of the brewhouse, and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the drayman

signed it. The drayman died: his entries, signed by him, were held to be good evidence, on proof of his hand-writing.

If the person, who made the entry, was employed as shopman or clerk to deliver goods, &c., and he is since dead, an entry made by him will be evidence, under certain restrictions. *Cooper v. Marsden*, 1 Esp. N. P. 6, 2.

The entries in a book are rejected, on the ground that they are mere hearsay, and can only be made evidence by some extrinsic circumstance.

Some of the English authorities considered the evidence admissible, in Lord Torrington's case, on the ground that the entry was made against the interest of the party making it. However this may have been viewed in certain cases, it is not the light in which the principle of that case has been generally considered.

The rules of evidence were formed and modified to meet the exigencies of human transactions, and to conduct the mind to truth; that they should be matured and expanded, so as to meet the complicated and growing relations of society, was to be desired and expected. But these rules are not to be lightly departed from. Where they fail to meet the endless variety of facts in cases which arise, they afford principles susceptible of expansion, so as to apply to the leading facts in every controversy.

Mere entries in a book of accounts are not evidence, whether made by the party himself or his clerk. But where entries were made by a party against himself, they were held to be evidence, in case of his death. This was upon the ground, that he could have had no motive to make a false entry. And this principle was eventually applied to a clerk, where his entries were regularly made, and the books, upon their face, were fair. In the case of *Nicholls v. Webb*, 8 Wheat. Rep. 457, the Court say: "we think it a safe principle, that memorandums made

by a person in the ordinary course of his, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish its credibility or certainty."

And it is now fully settled, that the entries of his deceased clerk, in the books of a merchant, are evidence in his behalf, the hand-writing being proved. *Clark v. Magruder*, 2 Har. & John. Rep. 77. *Welsh v. Barrett*, 15 Mass. Rep. 386. *Brown v. Brown*, 2 Wash. Rep. 151. *Union Bank v. Knapp*, 8 Pick. Rep. 98. *Patton's Administrators v. Craig's Administrators*, 7 Serg. & Rawle, 126. *Hood v. Reeve*, 3 Carr. & Payne, 532. *Halliday v. Martinet*, 20 John. Rep. 168. *Wilbur v. Selden*, Cowen's Rep. 162.

Had the books of the plaintiff been before the Court, the entries in the hand-writing of the deceased clerk would have been evidence, his hand-writing being proved. But the paper, attached to the deposition, contained a copy from the books. So far as the deponent could swear to the items delivered, this copy was a part of the deposition; but it was no evidence of the articles charged, of which the deponent had no knowledge.

This paper, in regard to these articles, was incompetent evidence, on two grounds: First, it was a mere copy from the books; and, in the second place, some of the entries are in gross, not specifying the items. A new trial must, therefore, be granted.

As the books of the plaintiff are at New Orleans, some inconvenience may arise from this decision. If his books are so connected that he can not, without injury, bring them to this Court, it might, perhaps, be deemed proper by the Court to appoint a commissioner to examine the books, and take testimony respecting them. This, however, is a mere suggestion, and not a settled rule of practice.

LINCOLN vs. TOWER.

Judgments of the several states, under the constitution and laws of the United States, have the effect, as evidence, in all the states.

The record imports absolute verity and cannot be traversed.

But when the record of a judgment is offered in evidence, the Court called to act upon it must inquire whether the Court rendering the judgment had jurisdiction.

If it had no jurisdiction the judgment is a nullity.

A proceeding by attachment is a proceeding in rem, and cannot bind the defendant in personam, unless he appears to the action.

If a suit be commenced by attachment, and there is no personal appearance, the judgment beyond the jurisdiction and the property levied on will be of no validity.

No state can bind, by its judgment personally, a defendant who is not within its jurisdiction, and on whom no notice has been served.

Where it appears, from the record, that process was served on the defendant, or that he appeared in the suit, the fact cannot be denied by plea.

The facts on the record necessary to give jurisdiction are material, and cannot be controverted.

The judgment of the Court on these facts, if it go beyond the power of the state, will be disregarded.

A plea may show in what manner, whether by personal service or by attachment, notice is given, as this does not contradict the record but limits its operation.

Every government can exercise jurisdiction over the persons and property within its limits but not beyond them.

Mr. *Lincoln* appeared for the plaintiff, and Messrs. *Edwards* and *Hall* for defendant.

OPINION OF THE COURT.

THIS is an action of debt brought on a judgment obtained in the State of Massachusetts.

The first and second counts in the declaration are on the judgment, and two other counts are added on the consideration on which that judgment was obtained.

To the first two pleas the defendant pleaded that he was not served with process in the suit in Massachusetts, and that he

did not appear in the case. To the two other counts the defendant pleaded the recovery of the judgment in bar.

The plaintiff demurred to the pleas, and for causes of demurrer assigned the following reasons:

First: The plea to the first and second counts does not show to the Court but that the said defendant was served with notice in some one of the ways provided by the laws of Massachusetts for the service of process.

Second: It does not appear from the plea that at the time of the service of the process in the plaintiff's suit, in his former action, the defendant was an inhabitant of the State of Massachusetts.

Third: The said pleas to the first, second, third and fourth counts, are inconsistent and irreconcilable.

Fourth: The plea to the third and fourth counts does not aver that said former recovery was by a court of competent jurisdiction.

Fifth: In other respects the pleas are defective in substance.

There is a repugnancy between the plea to the first and second counts, and that to the third and fourth counts. The former denies, in effect, the validity of the judgment, and the latter sets up the judgment in bar. If the first plea should be sustained, the latter, as a consequence, must be overruled. For, if the process was not served and no valid judgment was entered, the original cause of action is open, and may be examined and recovered under the third and fourth counts. But if the first plea shall be overruled, on the ground that the Massachusetts judgment is valid, the second plea must be held good, should the plaintiff claim under the third and fourth counts.

When matter of record forms the gist of the action and issue is joined upon nul tiel record, the record itself must be brought into court, or an exemplification of it under the act of Congress.

In England, if nul tiel record be pleaded and it be a record of the same court, the record itself must be produced. 2 Arch. Pr. B. R. 38. Tidd 801. On an issue of nul tiel record, of the record of a Superior Court, as if an action in the common pleas or record of the King's Bench be put in issue, as the inferior court cannot send for the record of the superior, a certiorari must be sued out with the cursitor, directed to the Chief Justice of the King's Bench, requiring him to certify the record of the Court of Chancery, and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by mittimus to the inferior court to be there used as evidence. 1 Arch. Pr. B. R. 139.

A record of an inferior court, if directly put in issue, is proved by the tenor of the record; which may be obtained without the intervention of the Court of Chancery, and certified under a certiorari issued by the superior court. Tidd 804. In cases where the record is not directly put in issue by nul tiel record, it may be proved by an exemplification, or by an examined copy. 2 Saund. Pl. 755.

Where a record of any of the superior courts is pleaded, it must be pleaded with a prout pater per recordum, and not with a profert; and, it seems, that oyer of it is not demandable. 1 Lord Raymond, 250. 1 Term Rep. 149. Com. Di. Pleader E. 29. 5 Coke 75, a.

In the case of *Westerwelt v. Lewis and Tooker*, p. 511 of the present volume, several of the points raised in this case were considered and decided. A reference was made in that case to the constitution of the United States and the act of Congress, and to several decisions of the Supreme Court, which gave the same effect to a judgment within any state, in every other state of the Union, as it has in the state where it is rendered. Some of these points, being very important, will be considered more at large.

It is a well settled principle that there can be no averment in pleading against the validity of a record, though there may be against its operation. 1 Chit. Pl. 320. 2 Saund. Pl. 754.

The plea of nul tiel record is proper either where there is no record, or where there is a variance in the statement of it. Com. Di. Pleader 2, W. 13, and Record. 6. Now if it be essential to the validity of the judgment that the record should show the jurisdiction of the court over the person of the defendant, by a service of process, it may be doubted whether nul tiel record was not the proper plea to raise the question. If the judgment be a nullity without the service of process on the defendant, he may well say there is no such record; or which, in effect, is the same, there is no effective judgment against him. But if the record shows that process has been served, it would seem to be clear that the defendant cannot deny the fact.

In this case no profert was made of the record, and no oyer has been prayed, or, according to the rules of pleading, could be given to the defendant. He has pleaded generally that no process or notice was served on him, and that he did not enter his appearance.

As the object of the counsel is, on both sides, to present certain questions to the Court for their decision, we will consider them as the counsel desire, without a special reference to the form of the pleadings.

And first, as to the jurisdiction of the court of Massachusetts, by whom this judgment was rendered:

This Court are presumed to be acquainted with the local laws of the respective states, and we necessarily know that the judgment in question was given by a court of general jurisdiction. And it is insisted that this Court are bound to presume jurisdiction in favor of judgments rendered by such court, whether the jurisdiction appears upon the face of the record or

not. In *Voorhees and others v. The Bank of the United States*, 10 Peter's Rep. 449, the Court say, there is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears.

In Kentucky it has been held, that when the judgment or decree of a sister state is produced, the Court will presume the tribunal rendering it possessed of competent jurisdiction and authority, and that it is binding on the parties. *Scott v. Coleman*, 5 Litt. Rep. 349, 350.

It is a universal principle in all courts that an order, decree or judgment of any court which has no jurisdiction of the matter is a nullity; and must be so treated when the record is offered in evidence, or used for any other purpose. *Borden v. Fitch*, 15 John. Rep. 121. *Newdigate v. Davy*, 1 Raym. Rep. 742. And in this respect there is no difference between a foreign judgment and the judgment of a sister state. The inquiry necessarily arises had the court jurisdiction of the subject matter of the judgment. *Rose v. Himely*, 4 Cranch's Rep. 241, 269. *The Neueva Anna and Liebec*, 6 Wheat. Rep. 193.

In *Umbragis v. Bligh*, 8 Bing. Rep. 335, suit was brought to recover damages awarded by the vice admiralty of the Island of Malta; and it was held that the decree to be binding must show that the defendant was brought within the jurisdiction of that court.

There are presumptions which arise in favor of the jurisdiction, in a particular case, of a court which exercises general jurisdiction, that do not apply to courts of a special and limited jurisdiction. But it may be somewhat difficult to draw the line between these jurisdictions as regards the present question, and especially in relation to foreign judgments, or the judgments of a neighboring state. Perhaps in the one case, the character of the courts being determined, the jurisdiction will

be presumed until the contrary be shown; and in the other, no such presumption arises and the jurisdiction must be proved. *Mills v. Martin*, 19 John. Rep. 33. *Peacock v. Bell*, 1 Saund. Rep. 73, 74. *Kemp's lessee v. Kenedy*, 5 Cranch's Rep. 173. 1 Peter's C. C. Rep. 30.

The extent to which the jurisdiction is exercised often becomes a question of great importance; and, in the argument, it has been raised in this case.

In many of the states suits are commenced by a process of attachment, which, being levied on any article of property of even five or ten cents value, authorizes a judgment against the defendant to the full amount of the plaintiff's demand.

On this judgment an execution may issue, and any property which the defendant may have within the jurisdiction of the court, may be levied on and sold in satisfaction of the judgment. This judgment, within the state, is binding on the defendant; and the question is, shall it be equally binding on him in any other state.

That this question is not clear of difficulty may be admitted. In the case of *Mills v. Duryee*, 7 Cranch's Rep. 481, the Court held a record duly authenticated gives the same effect to the judgment as evidence, as is given to it in the state where it was rendered. That the only inquiry is, the effect of the judgment in such state. And to this import are the other decisions cited in the case of *Westerwelt v. Lewis and Tooker*.

Now if it be admitted that the judgment on the attachment be as conclusive against the defendant, in the state where it is rendered, as a judgment on personal notice, why should not the same effect be given to it in any other state. The constitution and act of Congress refer to the effect of the judgment as evidence, and in no other respect.

By the constitution Congress have power, by "general laws, to prescribe the manner in which public acts of a state, its re-

ords and judicial proceedings, shall be proved, and the effect thereof." Not the effect of the authentication, as some courts have decided, but the effect of the public act, record and judicial proceedings. And by the act of 1790, Congress provided the mode of authentication, and declared "that records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the court of the state from whence the said records are or shall be taken."

It will not be contended by any one, that the constitution or law enlarges the jurisdiction of the state court. The power to do this is not conferred on the federal government.

If a state shall assume jurisdiction over the persons or property of individuals, not within the state, such a proceeding could be of no validity. It is true a state may prescribe certain penalties for acts done by its citizens beyond the limits of the state, and not within the organized jurisdiction of any other power; but such penalties cannot be enforced until the offenders shall come within the state.

When any court is called to receive as evidence the record of a judgment, foreign or domestic, its form and substance must necessarily be examined. Not, it is true, as a court of errors, but to see that it is what it purports to be, the record of a judgment. And if, upon the face of such record, a want of jurisdiction appears, it cannot be received as evidence. It does not bind the defendant, nor can it conclude his rights.

The laws of every empire have force only within its own limits. And all persons who reside temporarily or permanently within a government, are subject to its laws. And these laws, on principles of comity, are respected and enforced in other states in cases originating under them, provided they do not conflict with the rights of such states or of their citizens.

These are the axioms of Huberas, and they are maintained by Boullenois and Vattel.

No judgment of a state can act on property beyond its limits. If the person or property of an individual be within a state, it is subject to its jurisdiction. But if the proceeding be against the property only, the binding effect of the proceeding is limited to the property.

In 3 Atk. 589, Lord Hardwicke says, "he would not permit the plaintiff to avail himself of the law of any other country, to do what would be gross injustice." And in the case of *Buchanan v. Reeher*, 9 East's Rep. 192, 194, which was a judgment obtained in the Island of Tobago, by nailing up a copy of the declaration at the court house door, which, under the local law, amounted to a service on the defendant; Lord Ellenborough said, "can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, fairly construed, does not warrant such an inference; for "absent from the Island" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court, out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained." And this principle is sustained by American adjudications. *Mills v. Duryee*, 7 Cranch's Rep. 481, 486. *Piequet v. Swan*, 5 Mason's Rep. 35, 43, 44. *Borden v. Fitch*, 15 Johns. Rep. 121.

In *Douglas v. Forrest*, 4 Bing. 636, the Court sustained its jurisdiction under the following circumstances:

Hunter, who was the testator of Forrest, the defendant, being a native of Scotland, and owning heritable property there, contracted debts in 1799, and shortly afterwards left the coun-

try and went to India, where he died in 1817. In 1802 decrees for these debts were pronounced against him in the court of sessions. Of these proceedings Hunter had no notice, but the decrees stated that, according to the law of Scotland, he had been summoned at the market cross of Edinburgh, and at the pier and shore of Leith. These decrees adjudged that the property of Hunter should belong to the creditors in satisfaction of the debts.

But the defendant, at any time within forty years, had a right to dispute the merit of the decrees.

By the death of Hunter these decrees, it seems, did not operate as a satisfaction of the debts, and the above action was commenced against the executor, founded on them, which was sustained by the Court.

In his opinion Chief Justice Best draws a distinction, in regard to such proceedings, between a person who owes allegiance to the country and one who does not owe it.

That was a proceeding under the civil law, as adopted and modified by Scotland, and was somewhat analogous to the proceeding by attachment. The decrees, it seems, were enforced by a judgment in England.

The doctrine in that case, so far as regards the enforcement of the decrees, independently of the lien on the property, would not be sanctioned in this country.

Mr. Justice Story, in his *Conflict of Laws*, 461, remarks, treating on this subject, "sometimes the arrest or attachment is purely nominal, as of a chip or case, or both. In other cases the arrest or attachment is bona fide of real or personal property within the territory, or of debts in the hands of debtors, of the nonresident, who live within the country. In such cases, for all the purposes of the suit, the existence of such property, within the territory, constitutes a just ground of proceeding to enforce the rights of the plaintiff, to the extent of subjecting

such property to execution upon the decree or judgment. But it is to be treated to all intents and purposes, if the defendant has never appeared and contested the suit, as a mere proceeding in rem, and not personally binding on the party as a decree or judgment in personam. In other countries it is uniformly so treated, and considered as having no extra territorial force or obligation. *Philps v. Halker*, 1 Dall. 261. *Powling v. Bird's Executors*, 13 John. Rep. 192. *Bissel v. Briggs*, 9 Mass. Rep. 462.

In the case of *Bissel v. Briggs* Chief Justice Parsons says—“a debtor living in Massachusetts may have goods, effects, or credits, in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, or garnishee, of his debtor; and, on recovering judgment, those goods, &c., may be sold in satisfaction of the judgment.” But he held that such judgment, not being satisfied by a sale of the property, could give no foundation for an action in another state against the defendant, he having had no personal notice of the proceeding. And he further held, that if the defendant had appeared to the attachment, it could not have given the Court of New Hampshire jurisdiction of his person.

On this last point Judge Parsons was, probably, mistaken. The attachment is a mode by which to compel the appearance of the defendant, and if he do appear and contests the validity of the claim, there seems to be no reason why he should not be bound, in personam, by the judgment.

A person who enters within the limits of any country, is subject to its laws, and amenable to the ordinary process of its courts.

We can entertain no doubt when a record of a judgment is offered in evidence, if a want of jurisdiction is shown, or appears upon the face of the proceeding, it must be held as whol-

ly void. If the proceeding has been by attachment, and no personal notice has been given, and the defendant has not appeared, it does not bind the defendant. It is an ex parte proceeding, and beyond the property attached, and the local jurisdiction, the judgment establishes no right against him.

In the case under consideration the record states the fact, that notice was served on the defendant; and this he denies in his plea. Can the record in this respect be controverted?

Now, if the plea had stated that the notice was given by an attachment of property, and in no other form, the question, perhaps, might have been raised, whether such a notice was binding beyond the property attached. Such a plea would not have contradicted the record, but would have shown what effect was to be given to it.

In the case of *Starbuck v. Murray*, 5 Wend. Rep. 148, the Court held that "any fact stated in the record, upon which jurisdiction depends, may be put in issue, and controverted with the same freedom as other facts to which the record has no relation." And Mr. Justice Marcy, in delivering the opinion of the Court, very much to his own satisfaction, and, no doubt, to the satisfaction of the Court, sustains the above doctrine.

In reference to the argument that the record imports absolute verity and can not be controverted, he says—"it appears to me that this proposition assumes the very fact to be established, which is the only question in issue." "For what purpose does the defendant question the jurisdiction of the Court? Solely to show that its proceedings and judgments are void, and, therefore, the supposed record is not, in truth, a record." And he says that this "process of reasoning is, to his mind, little less than sophistry." "The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared, and you appeared because the paper is

a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact."

Now, with the greatest respect for this opinion, I am obliged to incur the imputation of reasoning in a circle, and of using what, to Mr. Justice Marcy's mind, is little less than sophistry.

It must be admitted that the "proposition assumes the fact to be established." The fact is, that the defendant was served with process, or appeared to the action, and this the record asserts. And the plaintiff insists that this being a fact which is matter of record, can not be denied by a plea. But this, says Justice Marcy, assumes the fact to be proved. Most certainly it does. The fact is proved by the highest evidence. It is not to be questioned in any court.

Apply the same argument, as to the fact of judgment having been rendered. If this be shown by the record, can it be denied by a plea? And this, too, would assume the proposition to be proved. In the language of Mr. Justice Marcy it may, perhaps, be asked, for what purpose does the defendant question the fact of judgment? Solely to show the invalidity of the record. Now, the record, and the record only, can prove the rendition of the judgment, as it proves the appearance of the party. Of both these matters the Court, before whom the proceedings were had, had judicial cognizance, and they are equally established by the record.

A defendant comes into court in his proper person and confesses judgment, or acknowledges the service of process, and this becomes matter of record. And yet it would seem, from the above opinion, the fact may be denied by a plea. If this may be done, it is difficult to say what part of a record may not be denied. Every thing of which the Court must take judicial cognizance, and which is stated in the record under

their judicial sanction, must be held to be absolutely true. If a clerical error has intervened in making up the judgment, or any other part of the record, application should be made to the Court, before whom the proceedings were had, and they are authorized to correct it. But the doctrine that these matters, or the verity of a record, may be tried on an issue before the country seems to be new.

Where the action is on a foreign judgment, in some of the states, the plea of nul tiel record may conclude to the country. But it is believed the truth of the material facts stated upon the record, has not heretofore been subjected to this ordeal. If effect be given to the constitution and the act of Congress, in relation to this subject, the record must be taken as true, and can not be controverted.

The appearance of the defendant is a material fact, and so is the service of process. It is admitted that the allegations in a record which were not material nor traversable, are not conclusive on the parties. But the record is conclusive of all matters in relation to the judgment which were material, and which might have been traversed. And these can not be contradicted. *Berks and Dauphin Turnpike Co. v. Hendel*, 11 Serge. and Rawle, 123. *Leech v. Armitage*, 2 Dall. 125. *Green v. Ovington*, 16 John. Rep. 58. *Fields v. Gibbs*, 1 Peters' C. C. Rep. 155. *Commonwealth v. Churchill*, 5 Mass. Rep. 176, 182. *Whiting v. Cochran*, 9 Ib. 532.

In *Thompson v. Talmie*, 2 Peters', 165, the Court say—"the age of the heirs was, at all events, a matter of fact upon which the Court was to judge; and the law no where requires the Court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the Court had satisfactory evidence before it that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the Court depended upon

that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the Court. But to permit that fact to be drawn in question, in this collateral way, is certainly not warranted by any principle of law."

In the case of *Rose v. Himely*, 4 Cranch, 241, the Court remark—"where a claim to property is set up in one Court, founded on a sentence of another tribunal, the Court in which the claim is preferred, must, of necessity, examine the powers of the others in order to decide whether its sentence has charged the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered." And, also, the Court of a foreign nation must judge of its own jurisdiction, so far as depends on municipal rules, and its decision must be respected; but if it exercises a jurisdiction, which, according to the laws of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign Courts." This illustrates the question under consideration, though the remarks were made of a maritime court.

Upon the whole we can entertain no doubt that when the judgment of a neighboring State is offered in evidence, the inquiry must be made, whether the Court had jurisdiction over the parties and the subject matter. Not that any error in this collateral manner could be considered, but the rights of the defendant can not be concluded, unless he was properly before the tribunal. And of this the Court, which shall be called to give effect to the judgment, must judge. But we think that the facts material to the case, and which appear in the record, can not be controverted. If, from these facts, it appears that the Court had no jurisdiction over the person of the defendant,

the judgment will be disregarded. And we see no objection to pleading such facts as go to restrain the effect of the judgment, but do not contradict, in a material part, the record. Of this character, as before remarked, would be a plea showing that the notice could only effect the property of the defendant and not his personal liability.

Without deciding whether the want of notice could not be shown under the plea of nul tiel record, it is enough to say that in no form of pleading can the defendant deny the service of process, or his appearance, which, in the present case, is matter of record. We think the allegation in the declaration a most material one, as it lies at the foundation of the jurisdiction of the Court.

It was clearly unnecessary for the defendant, in his plea, to alledge, as supposed in the second cause of demurrer assigned, that the defendant was an inhabitant of Massachusetts at the time the process was served. It was enough that the process appears to have been served on him within the State.

The pleas are, as stated in the third cause, inconsistent. And as regards the fourth cause of the demurrer, that the plea which sets up the recovery of the judgment, in bar, does not show it was before a court of competent jurisdiction; the title of the Court was given in the plea, and the Court officially know, from the laws of Massachusetts, that it was a court of competent jurisdiction. A plea need not state matters of law. The fifth cause is formal and general.

We think the judgment is conclusive and final against the defendant, the Court in Massachusetts having had jurisdiction in the case.

LAWRENCE AND EMMERSON vs. SHERMAN.

Proof that a sheriff, or other public officer, acted as such, is sufficient.

Where a deputy sheriff has sold property under a defective execution, the principal is chargeable, he having sanctioned the transaction.

By the statute of Illinois, where property is claimed by a third person, a jury is required to be summoned by the sheriff to try the right, and their verdict must be in writing under their signatures. Parol proof of such a proceeding is not admissible.

This writing it is in the power of the sheriff to produce, and he must produce it, or show that it has been lost or destroyed.

Mr. *Butterfield* appeared for the plaintiffs, and Mr. *Spring* for the defendant.

OPINION OF THE COURT.

THIS is an action of trover, for certain articles of ready-made clothing and two pieces of cloth. This property the plaintiffs insist belonged to Mary Sewell, she having received it from her father, and for whom the plaintiffs act as trustees.

The defendant filed the general issue. On this issue the capacity in which the plaintiffs sue is not, they insist, contested.

A deed, however, was introduced showing the appointment of the plaintiffs as trustees, and the title to the articles claimed was proved to be in them, though Mary Sewell had possession of them.

The property was levied on by virtue of an execution in behalf of *The State Bank v. C. Doolittle*, issued to the defendant, who is sheriff, as the property of Doolittle. The property was levied on, and sold by Smith the deputy sheriff.

The execution seems not to have been sealed, and it was objected that the deputy was not authorized to act under it, and that the act did not bind his principal. But the Court held, that the act being done under color of authority, and having

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been sanctioned by the principal, he was responsible. They, also, held that no other proof than that the defendant acted as sheriff was necessary to charge him as such.

By a statute of Illinois, when property is levied on which is claimed by a person, other than the defendant, the sheriff or other officer is required, on notice of such claim, to summon a jury of twelve persons, and, after being sworn, the evidence of property is heard by them, and they return their verdict, in writing, under their signatures, and this verdict, if against the claimant, is a justification to the sheriff in selling the property.

Parol proof of this proceeding was offered and overruled by the Court.

The effect of this proceeding is a justification of the sheriff. The inquest was called by him, on notice of the claimant, and he superintended the inquiry. He has possession or control of this action of the jury, and no excuse is offered why the writing is not produced. It is the best evidence, and no proof of a secondary character can be received, unless it be shown that the written verdict is lost or destroyed.

The jury found for the plaintiff, on which a judgment was rendered.

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A mortgagee has a right to pay off prior incumbrancers, and be substituted to their rights. And where two persons have liens on the same property for different debts, and one of them has, also, a lien on other property, chancery will direct such property to be first sold, before that which is common to both liens.

Mr. *G. T. M. Davis* appeared for the complainant, and Mr. *Hall* for the defendants.

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OPINION OF THE COURT.

THIS is a bill to foreclose a mortgage executed by Howard to the complainant. . The other defendants are judgment creditors, except the State Bank of Illinois, which is a subsequent mortgagee. The bank alone has answered, and states that it has a mortgage on a part of the premises, and prays that the other part may be first sold in satisfaction of the complainant's mortgage.

To this the complainant objects, on the ground that the statute regulating the sale of real estate, which has been adopted by this Court, gives to the complainant a right to elect what property shall first be sold in satisfaction.

It is a well settled principle in equity that a subsequent incumbrancer may discharge prior liens, and be substituted to all the rights arising under such liens; and where two persons have a lien on the same property to secure different debts, and one of them has, also, a lien upon other property, a court of chancery will direct such property first to be sold in satisfaction of the separate lien before that which is common to both liens. *Findlay's Executors v. Bank of the United States*, and the authorities there cited in this volume of Rep. 2 Story's Eq. 480.

In adopting the State rule, in regard to sales like this, the Court did not change, or intend to change, this principle of equity. So far as the State practice can be followed, without counteracting any established rule of equity practice, it is adopted.

LEAVITT ET AL. vs. COWLES ET AL.

The citizenship of the party, which is to give jurisdiction to the Court, must be specially averred.

That the plaintiffs are citizens of New York, to wit: Of Illinois, where the suit is brought, is a repugnant averment.

On a lost note which has been assigned, suit must be brought in the name of the assignee. The promisee being in possession of the note, and having assigned it merely for the purpose of collection, may strike out the assignment, and sue in his own name.

The legal right is vested in the assignee, and can only be divested by striking out the assignment as above, or by reassignment. Counts before verdict may be discontinued.

Mr. *Davis* appeared for the plaintiffs, and Mr. *Krum* for the defendants.

OPINION OF THE COURT.

This action is brought on two promissory notes. The first count states one of the notes, and alleges the plaintiffs made the following indorsements—"Pay J. J. Fish, Cashier, or order;" J. W. and R. Leavitt. "Pay J. Smith Homar, Esq., or order;" John J. Fisk, Cashier. "Pay to the order of J. H. Lee, Esq., Cashier;" John B. Camden, President; and that the same indorsements made were merely for the purpose of collecting the notes, &c., and that the property in the note is now and ever has been in the plaintiffs. That the note was casually lost, &c,

The second count differed only from the first in stating that the note was lost in the mail, and that the plaintiffs tendered a bond of indemnity.

The third count is on a different note, payable as the first one was, at the Alton Branch Bank, &c., indorsed as above, and was presented at the bank for payment. The fourth and fifth counts were general for money had and received, &c. In the last count the plaintiffs aver, that at the several and res-

pective times when the various causes of action accrued in the several counts, &c., they were citizens of the State of New York, to wit: At New York, in the State of New York, to wit: At Springfield, in the State and district of Illinois, aforesaid, and within the jurisdiction of this Court.

To the declaration a general demurrer was filed.

The Court remarked that there was a repugnancy, as to the averment of citizenship of the plaintiffs, in stating that they were citizens of New York, to wit: of Illinois.

This is the form used in declaring on a note, dated at a particular place, and payable there, in order to bring the cause of action within the jurisdiction of the Court. But the citizenship of the plaintiffs being in this case the ground of jurisdiction in the Federal Court, it should be averred positively, and not as in this declaration. They, therefore, suggested the propriety of an amendment of the declaration in this particular.

And as regards the assignments of the lost note, set out in the first and second counts, the Court remarked—the title of the note did not appear to be in the plaintiffs.

A note having been assigned, as they alledge, for the mere purpose of collection, being in the hands of the promisee, he may strike out the assignments and sue in his own name. This striking out makes the note conform to the declaration; and the possession and property of the note being in the promisee, he has a right to strike out the indorsements; but the present note is not in possession of the plaintiffs. The indorsements remain, and the plaintiffs seek to recover by stating the indorsements, and alledging that they were merely made for the purpose of collection. For whatever purpose they were made, no one can doubt that they authorized the last indorsee to bring the action in his own name. The legal right was then vested in him, and this right can not be divested except by reassignment, or by being stricken out. And

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when stricken out it is never necessary, or, indeed, proper to state the indorsements in the declaration.

It was formerly the English practice to insert a special count on a lost note, in order to let in evidence of a secondary character, but this is not necessary. *Benner v. Bank of Columbia*, 9 Wheat. 581.

There can be no doubt that a note indorsed merely to enable the assignee to collect it, and which has become lost, may be recovered for the benefit of the original promisee, in the name of the assignee. And we suppose that this is the proper form of bringing the action under the circumstances of this case.

The plaintiffs asked leave to discontinue the first and second counts, which was granted. Counts before verdict may be discontinued. *Hughes v. Moore*, 7 Cranch, 176.

POSTLEY AND POSTLEY vs. HIGGENS.

A motion to quash the bail bond, under the statute of Illinois, may be made at any time during the return term, as well after as before judgment.

An affidavit which states positively, as to the indebtedment, without detailing the source of the knowledge, is sufficient.

A presumption can not be drawn against the existence of a fact positively sworn to. The taking of the affidavit to hold to bail is an ex parte proceeding.

Mr. *Beaumont* appeared for the plaintiffs, and Mr. *Logan* for the defendant.

OPINION OF THE CIRCUIT JUDGE.

In this case a judgment by default having been entered, a motion is made by Mr. Logan to quash the bail bond taken by

the marshal, on the ground of the insufficiency of the affidavit on which bail was required.

It is objected that the motion, not having been made until after judgment, comes too late.

The statute provides that the motion shall be made at the return term. This is the return term, and no reason is perceived why the motion should not be made at any time during the term, as well after as before the rendition of judgment.

The following is the affidavit: Personally, before the undersigned, &c., A. C. Beaumont, attorney for plaintiffs, who, being duly sworn, states, that Ebenezer Higgins is justly indebted to the said plaintiffs, in the sum of five hundred thirty eight dollars and eighty eight cents, upon a certain bond made 31st January, 1830, by the said Higgins, in the penal sum of one thousand dollars, &c.

The objection to this affidavit is, that the affiant does not state how he knows of the indebtedment. And the case of *Wright et al. v. Cogswell*, 1 McLean's Rep. 471, is referred to as sustaining the objection. In that case the affidavit stated, "that he was informed, and verily believes, the defendant was justly indebted, &c." And this, the Court say, is no more than any one could say from the legal import of the obligation. That the statute required something more than the belief of the affiant.

Now, the affidavit under consideration states the indebtedment in positive terms. The affiant says the defendant is justly indebted to the plaintiffs in the sum specified. Is it necessary to state how he came by this knowledge? It would seem to me not. He swears to the fact, and he could not do so without a personal knowledge of the fact. And can it be presumed, against his statement, that he has not a knowledge of the fact. This would be in violation of all known rules of

construction, and especially in giving a construction to an affidavit.

This was an *exparte* proceeding. No notice was necessary, and of course there could be no cross-examination. And what the witness has sworn to must be taken as true, and it seems to me that the affidavit is as full and as positive as the statute requires. I am, therefore, in favor of overruling the motion. The District Judge differed in his construction of the affidavit under the statute, but the Court being divided the motion failed.

COOPER vs. BROWN AND OTHERS.

A court of equity will not decree a specific performance of a contract, at the instance of the vendor, where he has been guilty of a gross negligence, and the property has greatly deteriorated in value.

The consideration of the purchase having been paid to the vendee, in case of his death, his representatives are bound to use, at least, reasonable diligence in executing a conveyance.

Where the vendor has been so negligent as to have no claim on a court of equity, for a specific performance, the vendee may disaffirm the contract, and recover back the money paid, in an action for money had and received.

The vendor is bound to make and tender the deed.

Where a specific performance can not be enforced by the vendor, by reason of his own laches, it would seem that a demand for a deed, by the vendee, can not be necessary, before bringing of the action for the consideration money.

It is not perceived why the bringing of the action, in such a case, by the vendee, is not, of itself, a disaffirmance of the contract.

In this case, however, there was a demand.

Mr. *Morris* appeared for the plaintiff, and Mr. *Butterfield* for the defendants.

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OPINION OF THE COURT.

THIS is an action of assumpsit, brought to recover the consideration paid for certain lots of ground, sold by the defendants to the plaintiff, in June, 1836, and which they agreed to convey by a deed of general warranty, but which they had failed to do. One of the parties from whom the deed was to come, deceased, and no steps were taken to procure a conveyance from the representatives of the deceased, by the defendants, until August, 1838, when a bill was filed. This bill is still pending, and has not been prosecuted with ordinary diligence. In the mean time the property purchased has so deteriorated in value as not to be of one fourth the value it was at the time of the purchase.

Upon this state of facts, the Court instructed the jury to find for the plaintiff, which they did, in order that the points raised by the defendants' counsel might be considered, on a motion for a new trial.

This motion was made, and rested upon two grounds—

First: A sufficient excuse has been shown for the delay in executing the deed;

Second: The remedy of the plaintiff is on the contract to convey, and not on the general money counts.

Several years have transpired since this deed was to have been executed, and it appears that the defendants are chargeable with negligence. A demand of it has been made by the plaintiff. On the death of the person in whom the fee of the lots was, in part, vested, they should have obtained an order of court, by bill in chancery or otherwise, under the statute, for the executors or heirs to make a conveyance, in fulfillment of the contract. But great delay took place before this application was made, and the bill has been pending nearly three years, and no final order or decree has yet been obtained. This shows a want of that diligence which the law imposes.

In addition to the unnecessary delay, the property is now not worth, perhaps, the one fourth of the price which the plaintiff agreed to pay for it.

A delay in the performance of a contract, where a sufficient excuse for the nonperformance is given, and the condition of the parties and value of the property remain the same, substantially, as at the time of the contract, may be no obstacle to a decree for a specific performance. But there is no instance where the delay has been unreasonable, and without sufficient excuse; and the property has greatly fallen in value, where a court has decreed a specific execution of the contract. Under such circumstances, it would not be in the power of the Court to place the parties in the condition they would have been, had the contract been performed; and this is a sufficient reason why a court of equity will not decree an execution of it. This rule applies, with unanswerable force, to the case under consideration. *Nicholas Longworth v. James Taylor*, 1 McLean's Rep. 400. *McKay v. Carrington*, Ib. 59. *Taylor v. Longworth*, 14 Peters' Rep. 174.

The second ground on which the motion for a new trial is founded, is equally unsustainable.

Where the vendor neglects, refuses, or is unable to make an operative conveyance, the vendee, having paid the consideration, may sue on the covenant for a deed, or disaffirm the contract, and bring assumpsit to recover back the money paid. By bringing an action on the covenant he may recover the damages he has sustained by the breach, on the part of the vendor. And these are, in some cases, ascertained by the estimated value of the property covered by the contract.

In the case of *Weaver v. Bentley*, 1 Caines' Rep. 47, Kent, Justice, in giving the opinion of the Court, said: "We are of opinion the plaintiff had his election, either to proceed on the covenant and recover damages for the breach of it, or to disaf-

firm the contract, and bring assumpsit to recover back what he had paid on a consideration which had failed." To the same effect is the cases of *D. Utricht v. Melchor*, 1 Dall. Rep. 428; *Howes v. Barker*, 3 Johns. Rep. 509.

Where the purchaser has paid any part of the purchase money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement for the nonperformance of it, or he may elect to disaffirm the agreement ab initio, and bring an action for money had and received to his use. Sugden on Vendors, 234. *Gillet v. Maynard*, 5 Johns. Rep. 85, note *a*, page 88.

In *Giles and others v. Edwards*, 7 Term Rep. 89, Lord Kenyon, C. J., said: "As, by the defendants' default, the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it."

Assumpsit for money had and received, lies when a payment has been made on a contract which is put an end to. *Towers v. Barret*, 1 Term Rep. 81.

This action cannot be sustained while the special contract or covenant is open and subsisting. If it remain open, the remedy is on the covenant; and this leads to the consideration of the ground on which the vendee may disaffirm the contract. This, it is conceived, he may do, in all cases where the vendor has failed, and has been guilty of such gross negligence as to prevent a court of equity from decreeing, at his instance, a specific performance. Whether or not the contract has been put an end to, may always be a subject of inquiry at the trial.

In *Fuller v. Hubbard and Williams' Administrators*, 6 Cowen's Rep. 11, the Court held where a contract to pay for and receive a conveyance of land, the money has been paid, though a conveyance has not been given, the vendee can not rescind the contract, and sue for the purchase money and inter-

est, but must bring his action on the contract, as one still subsisting. That where one agrees to convey land, on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance, and, after waiting a reasonable time for it to be made out, must present himself to receive it.

The contract in the above case was made, in 1812, by the plaintiff, to purchase one hundred acres of land for six hundred dollars. The sum of one hundred dollars was paid down, and the residue was to be paid in three yearly instalments, with interest. The vendee entered into the possession, and he made the last payment, in May, 1819, to the administrators of Smith. And the Court say, "the payments were made by the plaintiff upon the fact of the special contract. Every thing has gone on, for a series of years, upon the supposition that the agreement was valid and subsisting." And the Court held that it was the duty of the vendee to prepare a deed for the land, and tender it to the vendor, in pursuance of the custom at common law.

There were circumstances, in that case, of acquiescence by the vendee, in the protracted payments, and in his occupancy of the land, which might go far to excuse the delay in making the deed. A new trial was granted; and the same case is reported in 7 Cowen, 53, where the Court again held that the plaintiff could not recover on the general counts, for money had and received. The second opinion of the Court rested upon the ground, that the heirs of Smith could not be considered in default, as a deed had never been demanded of them by the plaintiff. And they held that, where a vendor dies, the same demand must be made of, and time allowed to his heirs, before a suit can be brought against his personal representatives, for damages.

Sometime before the commencement of this suit, a demand of the deed was made by the plaintiff of the executors of the deceased vendor, who were authorized, in the will, to execute a conveyance. The rule of the common law, as to the preparation of the deed by the vendee, has not, generally, been adopted in this country. It is not in force in this State. The vendor, who binds himself to make the conveyance, must make it. 1 McLean's Rep. 104-5. *Taylor v. Longworth*, 14 Peters' Rep. 175.

Doubts are entertained whether, under the circumstances of this case, a demand of the deed, though made, was necessary. Such had been the deterioration in the value of the property, connected with the lapse of time, that no court of equity could compel the vendee to receive a deed. Had the deed been made when the vendors were bound to make it, the property might have been disposed of at little or no loss to the vendee; but, now, he would lose at least three fourths of the consideration paid.

A demand can, in no case, be necessary as a mere matter of form. It presupposes a willingness, and, indeed, an obligation on the part of the person making the demand, to receive the deed demanded. And, in this case, it would seem not to have been necessary for the plaintiff to make a demand of a deed from the defendants; for, assuredly, he was not bound to receive a deed, and give up his claim to a return of the consideration money, when the demand was made.

This would clearly be the case, if the action were founded upon the agreement; and the rule would seem equally to apply where the action, for money had and received, is brought. That contract, which can not be enforced by one party, by reason of lapse of time and his own laches, may, it would seem, be disaffirmed by the other party. The contract, in fact, is of no force in behalf of the vendor, either in a court of law or equity.

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The plaintiff never had possession of any part of the premises, nor are there any circumstances which can go to show, on his part, an acquiescence in the delay of making the title. Upon the whole, the motion for a new trial is overruled, and a judgment is entered on the verdict.

THE UNITED STATES *vs.* LINN AND OTHERS.

The general doctrine as to the application of payments, is, that if the debtor fail to apply them, the Government may do so. If both fail, the law will make the application, as the principles of justice shall require.

Where different sets of sureties are concerned, this rule does not govern.

Sureties are only bound, on a Receiver of public moneys' bond, that he shall pay over all moneys received, after the execution of the bond.

They are not bound for any previous defalcation.

And the Government can not bind them, by the exercise of any supposed power, to make application of the payments made.

If the sureties are at all responsible, they must be made so by strict law.

As, between different sureties, the Court will apply the payments so as to avoid injustice.

And this they can do from the face of the transcript.

Where the payments exceed the receipts in any one quarter, the excess shall be applied to the payment of the previous quarter, though such quarter be prior to the date of the bond.

Where a general payment has been made some years after expiration of the bond, the payment must be applied, as stated on the transcript, to discharge, pro tanto, the general balance.

Mr. *Baker* and Mr. *Butterfield*, the District Attorney, appeared for the plaintiffs, and Messrs. *Logan*, *Brown* and *Davis*, for defendants.

OPINION OF THE COURT.

THIS action is brought on an official bond, given by Linn, as Receiver of Public Moneys, and signed by the other defendants, as sureties. The defendants pleaded that Linn had paid over all moneys which had come to his possession, as Receiver.

The bond, dated the 2d May, 1831, was given in evidence, and, also, a transcript from the books of the Treasury, showing the accounts of Linn, from the 12th January, 1831, to the 12th of February, 1835.

From the face of this transcript, it appeared that Linn was charged with various sums of money, received prior to the date of the bond; and, from some of the quarterly payments, it appeared that he had paid over more money than he received within the quarter. The credits, as they were received, were entered on the books, and the balance against the Receiver was carried, as a debit, to the accounts of the succeeding quarter; and, in that form, the general balance was made up against him.

On this state of facts, it was contended that the Government had a right to apply the money received, subsequently to the date of the bond, to the discharge of any balance which the Receiver owed at the date of the bond; and, that the payment had been so applied, appeared from the transcript.

The doctrine, as to the application of payments, is, at all times, important; but it becomes peculiarly so when the rights of sureties are affected. This question was somewhat examined in the case of *The United States v. January and Patterson*, 7 Cranch's Rep. 373. In that case the supervisor of the revenue for the District of Kentucky, (not Ohio,) in due form of law, appointed John Arthur, collector of the revenue. On the 25th of August, 1797, he and his sureties executed a bond, for the faithful performance of his duties, in the penalty of \$4,000. On the 23d March, 1799, the collector gave another bond, with Patterson, surety, in the penalty of \$6,000. The duties of the collector were commenced, and, from that time up to the 30th June, 1802, he was charged with having collected \$30,584 99 $\frac{1}{4}$. On the settlement of his account, in 1803, he was in arrear \$16,181 15 $\frac{1}{4}$, and suits were instituted on each of the bonds.

Performance was pleaded, to which the plaintiffs replied, that he had not collected and paid over, &c. Pending the suit, Arthur died.

The supervisor kept one general account, only, against the collector. On the trial the general account was exhibited, showing the above balance. They also showed the balance appearing to be due, when the second bond was given, amounting to the sum of \$6,483 59¢.

The defendants proved, by a witness, that James Morrison, the late supervisor, informed him that Arthur had paid a sufficient sum to discharge the bond first given. This fact was proved by the supervisor, and he admits that he may have told January that the whole of the bond would be paid off, if the payments made by Arthur should be so applied, and that it was his opinion that was the proper application of them.

On this state of facts, the plaintiffs moved the Court to instruct the jury, that the promise of the supervisor was not, of itself, an appropriation of the payments, unless it was followed by some act of appropriation. The Court overruled the motion, and instructed the jury, if they believed the supervisor had made the election and promise, as proved, it was a declaration of his election how the payments should be applied, and that an entry on the books to that effect was unnecessary. To this opinion an exception was taken.

The Court say the debtor may make the application of a payment at the time of making it; and, if he fail to do so, the creditor may make it. That, if neither exercise this right, the law will make the application. And, the Court further say, that a majority of the Judges are of opinion, that the rule, adopted in ordinary cases, is not applicable to a case circumstanced as this is, where the Receiver is a public officer, not interested in the event of the suit, and who receives on account of the U. States, where the payments are indiscriminately made, and where

different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, can not be applied to the first bond, without manifest injury to the surety in the second bond, and vice versa; justice between different sureties can only be done by reference to the collector's books. The judgment of the Circuit Court was reversed.

In *The United States v. Kirkpatrick and others*, the Court say "the general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and, a fortiori, at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted, than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts, according to the priority of time, so that the credits are to be deemed payments, pro tanto, of the debts antecedently due."

This view was given on an instruction of the Circuit Court, to which exception was taken, "that the payments made by the collector, for whom Kirkpatrick was surety, might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts, which were in force when the bond was given."

Now, what were the circumstances referred to? Reed was appointed collector the 11th of November, 1813, by the President, which appointment continued until the end of the succeeding session of the Senate.

The 24th of January, 1814, he was reappointed to the same office, by the President and Senate. And the question was,

whether the responsibility of the sureties extended beyond the duration of the first commission, and the Court held, very properly, that it did not.

It will be observed that, in this case, there was no question between the liabilities of different sets of sureties. The general rule as to the application of the payments, under such circumstances, was unquestionably correct. But the doctrine here laid down does, in no respect, conflict with the previous decisions in *The United States v. January and Patterson*. In that case the Court say, the ordinary rule which governs the application of payments does not apply. And the reason was, that distinct interests arose under different surety bonds, which took the case out of the general rule. And that this is the true principle, will be shown by subsequently adjudicated cases.

It may be proper here to remark that, in the case of *Miller v. Stewart and others*, 9 Wheat. 680, the case preceding that against Kirkpatrick, the Court held that the contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.

In *The United States v. Nicholl*, 12 Wheat. 505, the Court say: "The case of *The United States v. January and Patterson*, 7 Cranch, 572, is, in point, to show that, as to any disbursements of money, after the 30th of November, 1822, for which Swartwout was entitled to credit, it was at the election of the Government to apply them to either account. But there is no necessity for the application of the principle to this case."

The Court well remarked, that there was no necessity for the application of the above principle in that case. What was meant by the power of the Government to apply the payments, as decided in *The United States v. January and Patterson*, is not easily apprehended. For it is manifest that, in that case, the Court decided no such principle, but directly the contrary. They lay down the general principle as above stated, and then

say that the rule does not apply where there are different sets of sureties. That, to do justice to them, a reference must be had to the books, and, consequently, to the dates of the entries. Mr. Justice Tremble, who wrote the opinion in the case of Nicholl, must have used this language without referring to the case of *The United States v. January and Patterson*, or he must have referred to the general principle there laid down, and not to the exception on which the decision of the case turned.

There is no question that has ever come before the Supreme Court, better settled, than that a surety can only be bound from the date of his bond. No matter if the officer, at the time the surety is given, be a defaulter, unless the bond shall specially stipulate for past performances, or the money previously received shall be in the hands of the officer, the surety is not bound.

This question has frequently arisen on bonds given by Receivers of Public Moneys. A case of this kind was decided at the last term, between *The United States v. Boyd and his sureties*, 15 Peters, 187. Boyd's duties, as Receiver, commenced the 27th December, 1836; the bond, on which the suit was brought, was dated the 15th of June, 1837; and the condition was, "that Boyd should faithfully discharge the duties of his office, of Receiver of Public Moneys, for four years, from the 27th December, 1836;" and the Court held that the sureties were not bound for any defalcation, prior to the date of the bond. And they refer to the case of *The United States v. Giles et al.*, 9 Cranch's Rep. 212, where it was held, "if the Marshal, before the date of his official bond, receive money upon an execution due to the United States, with orders from the comptroller to pay it into the Bank of the United States, which he neglects to do, the sureties in his official bond, executed afterwards, are not liable therefor, upon the bond, although the money remained in the Marshal's hands after the execution of the bond."

That was a very strong case. For we should have supposed that a liability might arise on the bond for a failure to pay over the money, in the hands of the officer, at the time the bond was executed. The bond is, for the faithful performance of his duties, generally; and it is supposed to be a continuing duty to pay over money in his hands, as well after as before the execution of the bond. And this view is sustained in *Farrar and Brown v. The United States*, 5 Peters' Rep. 373. The Court there say, that "for any sum paid to Rector (surveyor general) prior to the execution of the bond, there is but one ground on which the sureties could be held bound, and that is, on the assumption that he still held the money in bank, or otherwise. If still in his hands, he was, up to that time, bailee to the Government."

Now, the question arises, whether the Government, in the case of a Receiver of Public Moneys, can apply the moneys received by him, and paid over subsequently to the execution of his bond, in discharge of a sum due by him prior to the date of the bond. If it can not do this, in the language of the Court, in the case against January and Patterson, the ordinary rule in regard to the application of payments, does not apply where the interests of sureties are involved. And this we take to be sound law.

The general principle is a sound one, but it can not apply to the prejudice of third parties. The contract of the surety is, that the officer shall pay over all moneys that shall come into his hands, after the execution of the bond. Where money is thus received and paid over, to apply it to any other purpose than a discharge of the liability arising subsequently to the bond, and hold the sureties responsible, would be an essential alteration in the contract. Not an alteration in form, but in substance; and this, it is clear, the Government has no power to make.

That such a power should be assumed to be exercised, under any supposed right in the Government to make an application of the payments, is extraordinary. Such an act is not only in direct opposition to the contract, but it is a fraud upon the sureties—such a fraud as no Court, the facts being undeniable, could sanction. It will be recollected that the application is the act of the Government. And, if it have not power to make it under the above circumstances, no such power exists, where the rights of third parties are involved.

The doctrine well applies between the principal, his sureties, and the Government. The sureties are bound, not for the performance of certain duties, but, positively, to pay so much money. Now, we will suppose that the principal is indebted to the Government in a sum for which no security has been given, and, under such circumstances, a general payment is made, no one can doubt that the Government may apply the payment to the discharge of either debt. And the sureties can not complain of this application; for the bond is without a condition, or, at least, it does not bind the principal to pay over moneys received from a particular source. It is this condition in the bond, to pay over moneys received, for instance, in payment of public lands, that takes the case out of the ordinary doctrine on this subject. And, unless the rights of sureties are totally disregarded, this exception must exist. It was made by the Court, in the case of January and Patterson; it is sanctioned by the immutable principles of justice, and can not, in good faith, be departed from.

We are, then, clearly of the opinion that the Government could not apply the moneys received, and paid over by Linn, since the execution of the bond on which this suit is brought, in discharge of any balance due before the bond was given. And the Court and jury can judge, from the face of the transcript, of the applications to be made, so as to avoid injustice

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to the sureties, which, at various times, were given by the Receiver.

Where the payments of any quarter exceed the receipts for such quarter, the excess shall be applied to the balance against the Receiver at the beginning of the quarter. And this upon the ground, that it is not presumable the Receiver made payments in advance, of anticipated receipts. The surplus will be presumed to have been paid out of moneys in his hands, prior to the execution of the bond, provided previous quarters, from the date of the bond, have been fully paid.

It appears that a payment of \$23,000 was made, in 1838, by the Receiver. This was after his resignation, and several years after the four years had expired, for which the bond was given. The Court, in regard to this payment, can make no other application of it than has been made in the transcript. It will go to discharge, pro tanto, the general balance against the Receiver and his sureties.

On the above principles, the case was submitted to the jury, who found a large balance in favor of the United States, for which a judgment was rendered.

OVERTON AND KING vs. GORHAM AND DURLEY.

A judgment having been obtained in this case, at a previous term, an execution was issued and levied by the late Marshal on real estate, which was sold by him after giving due notice.

After the levy and before the sale, the late Marshal was removed from office and a successor appointed; but before the

sale he was not notified of his removal, nor of the appointment of his successor.

On this state of fact a motion was made by Mr. Hatton, in behalf of the purchaser of the land, to set the sale aside on the ground that the late Marshal, having been removed from office, had no right to sell.

By the 28th section of the act of the 24th September, 1789, it is provided that "every Marshal or his deputy when removed from office, or when the term for which the Marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively, at the time of such removal or expiration of office; and the Marshal shall be answerable," &c.

The 3d section of the act of the 7th of May, 1800, provides "that where a Marshal shall take in execution any lands, tenements or hereditaments, and shall die, or be removed from office, or the term of his commission expire before sale, or other final disposition made thereof, the like process shall issue to the succeeding Marshal, and the same proceedings shall be had as if such former Marshal had not died or been removed, or the term of his commission had not expired."

From this provision it is clear that the sale in this case was irregular. After his removal from office the Marshal, under the act of 1789, has power to execute all such precepts as may be in his hands; but the act of 1800 provides that his successor shall sell the lands on which he has levied but not sold, before his removal. Notice to the late Marshal of his removal was not necessary. His functions were terminated by the act of removal.

The only doubt that arises is, whether the defendant should not have had notice of this motion. His rights may be affected by setting aside the sale. But as the provision of the act is peremptory, and the defendant cannot be notified without

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great inconvenience and delay, and as his counsel in the judgment may object to the motion, the Court will set aside the sale and order another execution to the present Marshal.

If any doubt could arise in the case, and it were possible to avoid this result, the Court would not decide the motion until a personal notice had been served on the defendant, unless he appeared by counsel.

WESTERWELT vs. LEWIS AND TOOKER.

Under the constitution and act of Congress, the judgment of a Court in any state is conclusive; and the same effect is given to it in every other state as it had in the state where rendered.

This question arises under the constitution of the United States and act of Congress, and the decision of the Supreme Court of the Union is consequently binding.

Indeed that Court can exercise appellate jurisdiction on the subject.

A plea of nil debet, in an action brought on a judgment, is bad on demurrer.

The record, when duly authenticated, contains absolute verity, and is conclusive.

Where no process was served on the defendant, and there has been no appearance, the judgment is a nullity.

A proceeding by attachment is a proceeding in rem, and only binds the defendant to the extent of the property levied on.

Where it appears, from the record, that process was served, or that there was an appearance, the fact cannot be controverted.

Nul tibi record, the only proper plea in such a case.

Mr. *Krum* appeared for the plaintiff, and Mr. *Logan* for the defendant.

OPINION OF THE COURT.

THIS is an action of debt brought on a judgment obtained against the defendants, by the plaintiff, in the State of New York.

Westerwelt v. Lewis and Tooker.

The defendants filed two pleas:

First: Nil debet.

Second: That no notice was served on the defendants before the rendition of the judgment.

To these pleas the defendants demurred.

The 1st section of the 4th article of the constitution of the United States declares, "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every state. And Congress may, by general laws, prescribe the manner in which such acts, records and proceedings, shall be proved and the effect thereof."

In the act of the 26th of May, 1790, it is provided "that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court, within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And such records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the court of the state from whence the said records are or shall be taken."

On reading this act and the constitution, it would scarcely be expected that any difference of opinion could arise on the construction of either. It is still more extraordinary, that after the Supreme Court, by repeated adjudications, had settled the construction of both, that any state court should adhere to a different opinion. This is so opposed to the course of the Supreme Court, in following the construction of the state constitutions and statutes, by the state courts respectively, that it was not anticipated. In fact, as regards the construction of the constitution and the act of Congress, the Supreme Court have appellate powers over the Supreme Court of a state.

In the case of *Mills v. Duryee*, 7 Cranch's Rep. 481, the Court held that a record authenticated as required by the act of Congress gives the same effect to the record, as evidence, as is given to it in the state where the judgment was rendered. That the only inquiry is, what is the effect of the judgment in such state. That whatever might be the effect of a plea of nil debet to an action on a state judgment after verdict, it is bad on demurrer. That an exemplification of the original record was sufficient without the original.

In *Hampton v. M'Connel*, 3 Wheat. Rep. 234, the Chief Justice says, this is precisely the same case as that of *Mills v. Duryee*. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States. That case was brought before the Court by a writ of error to the Circuit Court of the United States, in New York. A nil debet was pleaded to which there was a demurrer. And the Court again decided, as they had done in the case of *Mills v. Duryee*, that the plea was bad.

In pursuance of these decisions the courts of the United States have uniformly acted. And the same rule has been adopted by many of the state courts.

The plea of nil debet puts in issue the existence of the debt at the time of pleading. And if this be a good plea in an action on a judgment, it puts in issue the debt evidenced by such judgment. This cannot be done if any effect be given to the act of Congress and the constitution.

The judgments of a sister state were, at first, treated in New York as foreign judgments. They were considered only as prima facie evidence of indebtedment, liable, of course, to be

impugned. And although this ground has been somewhat receded from, yet it is difficult to determine what has been given up when a defendant is still at liberty to take issue upon the fact of his appearance, which is stated on the record. The adjudications in Massachusetts are not materially different, on this point, from those of New York. 5 Wend. Rep. 148. 9 Mass. Rep. 467.

Where, from the face of a record, it appears that the defendant has not been served with process, and has entered no appearance in the case, the judgment is treated as a nullity. And where, under the laws of some of the states, an attachment is the first process, and that being levied on any article of property, however small, gives jurisdiction to the court, a judgment is obtained, it is only considered as a proceeding in rem.

It is not in the power of a state court or a court of the United States, by process of attachment, to take cognizance of an individual who is not within its jurisdiction, and bind him personally by a judgment. Such a proceeding binds the property attached; but beyond that the defendant is not bound. It is a proceeding in rem, and, except the property levied on, the Court have no more power to affect the interests of an individual than if no process had been issued against him.

That the Court had jurisdiction of the person of the defendant must appear from the record, and where such fact does appear it cannot be controverted. As well might any other fact in the record be denied as this. The record is made out under the authority of the Court, and purports absolute verity. As evidence it cannot be questioned. If, in making up the record, through the inadvertence of the clerk, a mistake has occurred, the only mode of correcting it is by application to the Court who gave the judgment, and who have a right, at all times, to correct clerical errors.

By a statute in New York, where individuals are sued as co-partners, and process is served on one, judgment may be entered up against all of them, which operates only against the partnership property. And the partners on whom the process was not served, are permitted to come in on certain conditions, to contest the right of the plaintiff. And it is insisted that on one of the present defendants notice was not served, and on that ground the defendants have filed the second plea.

To this it may be answered in the first place, that the record shows a notice to the defendants. And in the second, that, admit the truth of the plea, the defendant could not ask to be placed in a more favorable position here than he could have claimed in the State of New York.

This would seem to result from the decisions adverted to, under the act of Congress. If the same effect is to be given to this record, as evidence, as would be given to it in New York, it must be conclusive of all the matters adjudged, unless they shall be opened up in the manner provided. In giving a judgment on this record we give to it the same effect that it had in New York.

Nul tiel record is the only plea, perhaps, which can be filed to an action founded on a record.

We do not speak of fraud which vitiates all transactions, judicial as well as others, and which may be set up by third parties, but not as between the parties on the record.

The demurrer to the pleas is sustained. Judgment.

Taylor and Bond v. Cook and Spaulding.

TAYLOR AND BOND vs. COOK AND SPAULDING.

By the constitution, jurisdiction is given to the courts of the United States, between citizens of different states.

The act of 1789 restricts the exercise of this jurisdiction to cases where one of the parties are citizens of the state where suit is brought.

And by the settled construction of this act, where there are more than one party, plaintiff and defendant, the Court must have jurisdiction between each party, plaintiff and defendant.

This produced great embarrassment in the proceedings before the Circuit Courts.

And to remedy this inconvenience the act of 1839 was passed, which enables a party defendant, who may not reside in the district, voluntarily to become a party to the suit.

By his submitting himself in this form to the jurisdiction of the Court the jurisdiction is not ousted.

Mr. *Morris* appeared for the plaintiffs, and Mr. *Arnold* for the defendants.

OPINION OF THE COURT.

The plaintiffs are citizens of New York; the writ was served on Cook, a citizen of Illinois; and Spaulding, a citizen of Missouri, enters a voluntary appearance. A question is raised whether the Court can take jurisdiction as the case now stands.

By the constitution of the United States, the judicial power extends to all cases in law and equity arising under the constitution, &c., and to controversies between citizens of different states, &c.

The 11th section of the judiciary act of 1789 provides, "that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. And no civil suit shall be brought before either of said courts, against

an inhabitant of the United States, by any original process in any other district than that whereof he was an inhabitant, or in which he shall be found at the time of serving the writ."

Under this section it was settled that, as between each plaintiff and each defendant, where there were more than one plaintiff and defendant, the Court must have jurisdiction. So that, by this construction, the Court could not take jurisdiction of this case; for, as between the plaintiffs who are citizens of New York and the defendant, Spaulding, who is a citizen of Missouri, the Court could exercise no jurisdiction in the State of Illinois; because in that case neither party would reside in the state where suit is brought. And, under the decisions, the consent of Spaulding (it appearing that he was a citizen of Missouri) could give no jurisdiction. This created great embarrassment to the proceedings in the Circuit Courts. Unless they could act on the interests of the defendants properly, before the Court, without prejudice to those who were interested and who did not reside within the district, they could exercise no jurisdiction in the case. To remedy this inconvenience the act of the 28th February, 1839, was passed.

The first section of that act provides, "that where, in any suit at law or equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the Court to entertain jurisdiction, &c.; but the judgment or decree therein shall not prejudice parties not served with process, or not voluntarily appearing to answer."

By the constitution jurisdiction is given to the courts of the United States, of all controversies between citizens of different states. And Congress have, unquestionably, the power to regulate the exercise of that jurisdiction in any mode which they

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shall deem expedient. Unless required by the act of Congress it would not be necessary that either party should be a citizen of the state where suit is brought. This provision of the act of 1789, however, is not repealed by the above act, but it is modified. It enables a party who is sued, with others, but who does not reside in the district, voluntarily to become a party to the suit. Where this is done the Court can exercise jurisdiction over him, the same as if he were a citizen of the district and process had been served on him.

The suggestion that by voluntarily becoming a party he ousts the jurisdiction of the Court, would give a most absurd effect to the statute. It gives a right to the party to appear, and yet by such appearance the jurisdiction is taken away. This would be a most singular mode of remedying an inconvenience which has long been felt and acknowledged.

That it was intended the Court should exercise jurisdiction over the person who thus voluntarily appears, by the fact of his being made a party to the suit, but also from the subsequent part of the section, which declares that the judgment or decree shall only affect the parties who have been served with process or who have voluntarily appeared. We can entertain no doubt that the Court have a right to exercise jurisdiction over Spaulding, under the act of 1839.

Hubbard v. Turner and others.

HUBBARD vs. TURNER AND OTHERS.

Fraud must be clearly proved.

A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor.

Although there may be an equitable lien on the mortgaged premises, yet the assignee having no notice of it is not affected by it.

Generally the mortgagor may claim the same rights against the assignee of a mortgage as against the mortgagee.

If the mortgagor have a setoff or mutual credit against the mortgagee it is not affected by the assignment.

A payment made to the mortgagee, after the assignment but before the mortgagor has notice of it, is good against the assignee.

The statute of Illinois, however, places bonds and mortgages and every description of instrument, for the payment of money, on the same footing as bills of exchange.

Under the statute of Illinois a declaration of trust not recorded is inoperative.

A mortgage on a large amount of property, for the payment of ninety thousand dollars, where but four thousand dollars were due to the mortgagee, is fraudulent, as against creditors.

And these facts are sufficient for the exercise of an equitable jurisdiction.

It is not the English practice to set up a matter in the answer, which shall have the effect of a cross-bill. And our practice is derived from that of the high court of chancery in England.

Messrs. *Morris* and *Thomas* appeared for the complainant, and Mr. *Butterfield* for the defendants.

OPINION OF THE COURT.

On the 19th April, 1836, the complainant for himself and others entered into two contracts with the defendant, Turner, for the sale of certain property in and near the city of Chicago, in this state.

In one of the contracts the complainant, for himself and as attorney in fact for Samuel Russell, entered into a penal bond for the conveyance of certain lots in Chicago, to wit—for the consideration of eight thousand seven hundred and fifty dollars, the complainant in his own right sold to Turner lots seven and

twelve, on the north side of the Chicago river, in Kinzie's addition to the original town plat. And as agent for Samuel Russell, for the consideration of twenty six thousand two hundred and fifty dollars, the complainant sold to Turner lots one, eleven and twelve, in block seventeen, and eleven and twelve, in block sixteen, ten and eleven, in block two, seven in block five, lying north of the river and within Kinzie's addition to the original town plat.

Deeds with general warranty were to be made for the above lots on the payment to the complainant in his own right, and as attorney in fact for Russell, as follows. "Five thousand dollars down; the same amount by a draft on the Otsego Bank of New York, payable the first of June ensuing; and the residue of the purchase money, being twenty five thousand dollars, was to be paid in three equal instalments—in six, twelve, and eighteen months—for which three promissory notes were executed by Turner, payable to the order of the complainant."

In the other contract a like penal bond was entered into by the complainant in his own right, and as attorney in fact for William H. Brown and William W. Saltonstall.

The bond recited that the complainant had sold to the defendant, Turner, for the sum of seventeen thousand dollars, lots six, in block twenty nine, near the junction of the north and south branches of the Chicago river, within the original plat of the town; two, four eight, twelve and sixteen, in the subdivision of block fourteen by Arthur Bronson.

And, as agent for William H. Brown, for the consideration of thirty thousand dollars, the complainant sold to the defendant, Turner, one half of eighty acres, being the east half of the northeast quarter of section seventeen in said town, known as Duncan's addition to Chicago. And, as agent for Saltonstall, for the sum of seven thousand dollars, lot eight, in block forty four, within the original town plat.

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Deeds of general warranty were to be made for the above on the payment to the complainant in his own right, and as agent for Brown and Saltonstall, ten thousand dollars down, seven thousand dollars on or before the twentieth of June next ensuing, fifteen thousand dollars on the twentieth of October ensuing, twelve thousand on the first of April ensuing, and the remaining ten thousand dollars, making in all the sum of fifty four thousand dollars, the nineteenth of October eighteen hundred and thirty seven.

Four promissory notes were executed by Turner in accordance with the above agreement.

On the same 19th April, 1836, the complainant entered into an agreement with the defendant, Turner, in which the lots purchased, amounting to fifty four thousand dollars, were recited in consideration of which, the sum of fifty dollars, and the per cent. commission and profit stated, did covenant with the defendant, his heirs and assigns, "to guaranty, warrant and insure to him, his heirs and assigns, that he and they shall realize and receive one hundred per cent. advance in eighteen months from that date from, and upon, said purchase money for all the property above mentioned, viz—upon the sum of fifty four thousand dollars." For this guaranty and insurance the defendant, Turner, his heirs, &c., agreed to pay to the complainant ten per cent. upon the amount which he or they should realize for the sale of the seven lots above stated, purchased for the sum of twenty four thousand dollars. And twenty per cent. upon the amount realized on the sale of the individual moiety of Duncan's addition, purchased at thirty thousand dollars. Turner, also, agreed to pay the complainant three thousand five hundred dollars; and, also, one half of all he should realize for the sale of the above lots, over one hundred and eight thousand dollars. And the defendant became bound not

to sell any part of the above property for less than one hundred per cent. advance on the purchase money.

On the 6th July, 1837, the complainant, and the defendant, Turner, entered into a new agreement which materially changed their former contracts.

At this time the defendant had paid, including interest, the sum of forty five thousand two hundred and twenty six dollars on the fifty four thousand dollar contract, leaving the sum of ten thousand dollars only, with interest, unpaid; and which was not due until the nineteenth of October, ensuing.

On the other purchase, of thirty five thousand dollars, there had been paid the sum of eighteen thousand six hundred and sixty two dollars, which included interest, leaving a note unpaid for eight thousand nine hundred and seventeen dollars fifteen cents, which was due the 19th of April preceding; and a note for nine thousand two hundred seven dollars and ninety five cents, which would fall due the 19th of October, ensuing.

On both contracts the sum of sixty four thousand and eighty eight dollars seems to have been paid by Turner. And he was in default only for the payment due the 19th April, as above stated.

Up to the time of the new arrangement, the principal matter in controversy between the parties, seems to be as to the effect of the contract of guaranty.

On the part of the complainant it is contended that under the guaranty, the defendant was bound to make the payments as they became due on both contracts; and having failed to do so, he can claim nothing under the guaranty. That the contract of guaranty was usurious and fraudulent, and consequently void.

Whether the guaranty was usurious or fraudulent will hereafter be considered; but it is clear that it referred only to the fifty four thousand dollar contract. The property sold by that

contract is named in the guaranty, and, also, the sum agreed to be paid; and in consideration of that purchase and the commissions allowed, on double the amount of the purchase money, the contract of guaranty was entered into. It had no reference to the other contract or to any payments to be made under it. So far then as regards the conditions of the guaranty, the defendant was in no default on the 6th July, 1837, when the new contract was made. The allegation in the bill that the payment of twelve thousand dollars was not made on the 1st April, 1837, when it became due, is denied by the answer, and is not sustained by the evidence.

As to the terms of the new contract the bill and answer are at issue. Prior to this time it is admitted that no part of the property, specified in the fifty four thousand dollar contract, had been conveyed to Turner.

The conditions of the guaranty contract were assumed, in part, as the basis of the compromise. Hubbard agreed to account to Turner for the sum of one hundred and eight thousand dollars, that being the amount of the fifty four thousand dollar purchase, and one hundred per cent. added thereto. To make up this sum, commissions were allowed and the premium of three thousand five hundred dollars, agreeably to the guaranty contract, which amounted to the sum of twenty thousand three hundred dollars. And conveyances were made to Turner of the Hubbard square and the Lake House property, in Chicago, for the consideration of fifty thousand dollars. A bond and mortgage were, also, executed by Hubbard for the payment of twenty six thousand seven hundred dollars, in five years, with interest. The aggregate of these amounts is the sum of ninety seven thousand dollars, leaving a balance of eleven thousand dollars due. And the parties differ as to the manner in which this balance was paid.

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On the part of the complainant it is contended, that it was paid by an allowance of three thousand dollars for settling the guaranty before it was due, and the consideration of eight thousand dollars for fifteen acres of land near Peru.

By Turner it is insisted the balance was paid by deducting the ten thousand dollar note and interest, due in October, 1837, on the fifty four thousand dollar contract.

The defendant admits that by the compromise he agreed to pay the two notes unpaid, under the thirty five thousand dollar contract. As above stated, one of these notes was for the sum of eight thousand nine hundred seventeen dollars and thirty eight cents, which was due 19th April, 1837.

The other was for the sum of nine thousand two hundred seven dollars and ninety five cents, payable the 19th October, 1837, making the aggregate sum of eighteen thousand one hundred twenty six dollars and thirty cents. From this sum the defendant states several sums were deducted, which, upon balances of accounts, &c., the complainant owed him, which reduced the amount due to the complainant under the compromise, to the sum of sixteen thousand three hundred eighty two dollars and twenty nine cents. And four drafts were drawn by Turner in favor of complainant on Huntington & Campbell and J. P. Huntington, of New York, amounting to this sum.

But the complainant insists that, in addition to the two notes above specified, the defendant agreed to pay the ten thousand dollar note, which would fall due in October, under the fifty four thousand dollar contract. And it appears, at the time of the compromise, the defendant drew in favor of the complainant, on the Hon. Daniel Webster, for ten thousand dollars, payable in ninety days, at the Merchants' Bank in New York. But this draft the defendant insists was a loan to the plaintiff, and not a payment under the compromise.

The complainant, also, alleges that, as a part of the consideration of the compromise, the defendant loaned him twenty thousand dollars, to be obtained from Mrs. Coultis, which were never obtained; and that in this, as also in his representations respecting the solvency of Huntington and Campbell, and the certainty of the drafts which he drew on them, and on J. P. Huntington's being punctually paid, the defendant was guilty of fraud.

In this part of the case three inquiries seem to arise:

First: Was the draft on Mr. Webster a loan?

Second: In what manner was the sum of eleven thousand dollars paid, by the complainant, under the compromise?

Third: Was Turner guilty of fraud as above charged?

The defendant, at the time he drew the draft on Mr. Webster, assigned to the complainant, as security for the payment of it, a mortgage given by Hugunin and Pearce for the payment of ten thousand dollars, in ten years from the 27th April, 1837. And Greenwood, a witness, who was the clerk of the complainant, at the time of the compromise, and who kept his books, swears that this draft was given in payment, under the compromise, and not as a loan.

Without explanation the fact of security having been given for the payment of the draft would seem to imply, very strongly, that it was a payment and not a loan. But even in this view it would be somewhat singular that security for the payment of this draft only should be required. The explanation, however, is found by a reference to the conditions on which the assignment of the above mortgage was made.

The instrument declares that the assignment of the mortgage was "to secure the following payment, and upon the following condition, viz: To secure the payment of a draft upon the Hon. Daniel Webster, &c., and upon this condition, that the said Hubbard shall execute, with his wife, at or before

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the maturity of said draft, either a warranty deed of fifteen undivided acres of land in eighty acres, being in section ten, near the termination of the canal from Chicago to Peru, Illinois; being the same fifteen acres of land he now owns; or shall, within said time last mentioned, execute, as aforesaid, a bond and mortgage to said Turner, for the payment of ten thousand dollars in eight years from the maturity of said draft, with annual interest, at seven per cent. Said mortgage to be upon unincumbered real estate to the satisfaction of said Turner." And Turner was to make his election within thirty days, whether he would take the fifteen acres or the mortgage.

Now, if this draft had been given in payment as alledged by the complainant, and sworn to by his witness, would security have been given for the repayment of it? We may imagine why security should be required for the punctual payment of a draft, but if drawn in payment of a debt justly due, there is no possible combination of facts or circumstances which could render necessary a security for its repayment. This would be utterly inconsistent with the fact of payment. If paid in discharge of a just debt, of course it would not be required to be repaid.

On the face of the draft Turner declared that he held himself individually responsible to the said Hubbard or his order, for the payment of it, agreeably to his covenant of that date executed to the said Hubbard. And it appears that Turner wrote to Mr. Webster, the same day the draft was drawn, requesting him not pay it unless advised by him; as Hubbard was bound to give security for the repayment of the amount before the draft was due. And such is the condition recited above.

From the condition it would seem that Turner had his option, whether to receive the Peru land in full for the draft on

Mr. Webster, or, a mortgage on unincumbered property, for the payment of ten thousand dollars, and interest, at seven per cent., in eight years from the maturity of the draft.

To avoid the condition of this assignment the complainant alleges that it was made on a paper disconnected with the mortgage of Hugunin and Pearce, and when drawn and executed it contained no such condition as it now contains, in regard to the Peru land, and the mortgage for ten thousand dollars in lieu of it, at the option of Turner. And it is alleged that the assignment, being in the hand-writing of Turner, he must have withdrawn it and substituted another with the above condition.

This allegation charges on Turner a fraud of a most serious character, and which requires clear evidence to establish it. The answer denies this allegation of the bill.

Greenwood, the plaintiff's witness, swears that there was no such condition as the above in the first assignment of the mortgage; but he admits that he was not present when the papers were executed. And Grant, another witness, the attorney of complainant, to whom the papers were submitted, also, states the assignment was without condition. This paper, with others, was acknowledged before Henry Brown, a Justice of the Peace, on the evening of the 10th of July, and the next morning Turner left the city. All the papers signed by Turner were left in possession of the complainant, this assignment among others; and he shortly afterwards handed them over to the recorder of deeds for the county, who recorded them.

The original assignment, as executed, is in evidence, and is identified and confirmed by the deposition of the justice of the peace before whom it was acknowledged. He took no acknowledgment of papers between Hubbard and Turner except at that time. There is no erasure or alteration on the face of this paper, and it contains the condition as above stated. The

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inference is, therefore, irresistible, that the witnesses, Greenwood and Grant, are mistaken. And if this paper be genuine, of which there would seem to be no doubt, the draft drawn on Webster was a loan to the complainant and not a payment. The transaction, it must be admitted, is out of the ordinary course of business, but it is not more so than some other parts of the dealings between the same parties. The draft on Mr. Webster was not paid, nor was the mortgage executed by the complainant to secure its repayment. The answer of this inquiry makes the answer to the second easy, as to the manner in which the sum of eleven thousand dollars was paid by the complainant under the compromise.

If the Peru land, at the option of Turner, was to be received for the draft on Mr. Webster, it could not have been applied as stated by Mr. Greenwood, the witness, as a credit of eight thousand dollars against the guaranty contract. The assignment of the Hugunin and Pearce mortgage shows that the draft was a distinct transaction, and was, in fact, a loan; and, if a loan, the Peru land could not have been offered as a discharge of it, if that land had been applied as contended for by the complainant. It must have been as free from the compromise as the unincumbered property on which the mortgage was to be executed, which Turner could demand in lieu of the Peru land.

To make up the eleven thousand dollars the complainant charges three thousand dollars in addition to the sum of eight thousand for this land, on the ground that he settled the guaranty contract before it was due. That contract was entered into the 19th April, 1836, and it insured an advance of one hundred per cent. on the fifty four thousand dollar purchase in eighteen months. The compromise was made the 6th July, 1837, so that there was little more than three months of that contract to run. A charge of three thousand dollars for the

payment, as settlement of this contract, in the manner in which it was settled, would have been a very extravagant and unjust charge. But the answer denies that any such charge was made by the complainant, or allowed in the compromise. And there is nothing in the evidence, or the circumstances of the case, which can overcome the answer. We are satisfied, therefore, that the payment of eleven thousand dollars was not made as insisted on by the complainant, but was, in fact, made by the application of the ten thousand dollar note, due 19th October, 1837, as set up in the answer of Turner. The interest on that note, up to the time it became due, being added to the principal, made the sum of eleven hundred and fifty dollars. This exceeded, by the sum of fifty dollars, the amount necessary to close the compromise; but this small sum was, probably, disregarded as the note was not due. The calculations seem not to have been made with much accuracy.

We come now to the third inquiry proposed, whether Turner was guilty of fraud.

Were his representations in regard to the loan of twenty thousand dollars from Mrs. Ann Coultis fraudulent? The bill so charges.

Now, from the evidence this loan seems to have been a transaction subsequent to the compromise. It was then not a part of it.

On the 10th of July, 1837, Turner wrote to his father-in-law, Robert Campbell, that Hubbard was anxious to make a loan of twenty thousand dollars, for ten years, at seven per cent.; and, as the security was good, he thought it advisable to loan him, for Mrs. Coultis, the above sum, in case she had got returns, and had not made other disposition of her money. This lady, Turner represented, expected a large sum from England, and would, probably, receive it through Prime, Ward and King, of New York.

On the above date Hubbard wrote to Mr. Campbell, saying, that Turner had made a conditional negotiation with him for a loan through Mrs. Coultis. And that if she should determine to loan him the amount, Hubbard requested Mr. Campbell to advise him of the fact.

From these letters it appears that Turner did not make the loan, but pledged his influence and agency, so far as he could exercise them, to obtain the money. He did not know that the money had been received from England; and, if received, that it had not been loaned. And Hubbard's own letter shows that he expected to obtain the money only by the determination of Mrs. Coultis, as he requests Mr. Campbell to advise him, should she determine to loan the amount.

It seems that Mrs. Ann Coultis received no money from England, and that Prime, Ward and King had not been advised on the subject. Mrs. Coultis had either been deceived herself, or was willing to practice an imposition on others, in regard to the money. But there is no evidence to sustain the allegation in the bill, that the representations, in regard to this loan, were made by Turner with the intent to defraud the complainant. His agency in the matter seems to have arisen from motives of friendship to Hubbard, and not with a view to defraud him. Turner was, no doubt, himself deceived as to the expectations of Mrs. Coultis.

Had the loan been negotiated on the security designated, from the depreciation in the price of property, as proved in this case, Turner, with more propriety, might have been charged with a fraud against Mrs. Coultis. This part of the bill is not sustained.

Strong representations were made by the defendant as to the solvency of Huntington and Campbell, and of J. P. Huntington, and that the four drafts drawn on them would be punctually paid; and he exhibited an authority to draw on

them. The answer avers that these representations were true. It seems that the defendant had drawn drafts on the same persons to a large amount previously, all of which had been paid; and there is nothing in the evidence which shows that he had not reason to believe, when the above drafts were drawn, they would not be paid. His calculations, like the calculations of all speculators, made at the time, were not realized; but the revulsion which took place in the price of property, and the general business of the country, seems not to have been foreseen by any one, much less by those who had yielded to the mania of the times. Under such circumstances a confident assurance of acceptance and payment of the drafts, by the drawer, followed by a failure to pay should not convict the drawer of fraud. That he was too confident in his expectation and assurances is shown by the result; but if this should make the transaction fraudulent, how can the complainant be sheltered from fraud in his confident representations of the great increase of the value of property sold by him to the defendant? In fact both parties partook, in a high degree, of the excitement of the times, and cherished the most visionary expectations of the future.

But if the defendant had made fraudulent representations in regard to the payment of these drafts, how could that affect this case? It might waive the necessity of a demand and notice, but that only goes to the personal liability of the drawer.

The complainant prays that the deed from Russell and C. L. Hubbard may stand, and that so much of the property thereof may be sold as shall satisfy the balance due of the purchase money.

Was the guaranty contract in the first instance, or as acted upon by the compromise, usurious or fraudulent?

That the vendor should insure an advance of one hundred per cent. upon the property sold in eighteen months seems to

be extraordinary. And in ordinary times it would be. But when that contract was made a greater advance in less time was often realized by the purchaser. And when we look into the contract, and deduct the commissions allowed, the guaranty does not exceed much, if any, fifty per cent. These commissions amounted to the sum of twenty thousand three hundred dollars. And this sum, had the property advanced, as anticipated by the complainant, would have been to him a clear profit.

That there was no usury in the transaction is manifest. There was no loan, either by the intention of the parties, or by the words of the contract. The sale was a bona fide one, and the guaranty contract was entered into by the complainant, as an inducement to the defendant to purchase; and, also, with the hope that it would yield a handsome profit. It seems that was not the first contract of the kind made by the complainant. And from his past experience he considered himself, no doubt, more likely to gain than lose by that one.

But if there was any hardship in the contract, as at first made, there was none, to the complainant, as it was settled by the compromise.

At the time of the compromise the defendant had paid to the complainant more than sixty four thousand dollars; and, in addition to this sum, he agreed to pay sixteen thousand three hundred eighty two dollars and ninety nine cents, for which sum drafts were drawn. The defendant received by the compromise a conveyance of lots, estimated to be worth fifty thousand dollars, and a bond and mortgage for the payment of twenty six thousand seven hundred dollars, making the sum of seventy six thousand seven hundred dollars. By the compromise he paid, and agreed to pay, a sum exceeding eighty thousand dollars. From this sum should be deducted any amount of moneys received by Hubbard, on sales of prop-

erty covered by the thirty five thousand dollar contract, as agent of Turner; and for which he accounted in the compromise. But this deduction being made, would still leave the hardship of the compromise on the side of the defendant. A most extravagant estimate of value was placed upon the property conveyed to the defendant, and, also, on that which was mortgaged to him. The whole of this property is now believed to be worth less than one fourth of the sum at which it was valued.

On the 30th of October, 1837, Turner assigned the above bond and mortgage to the Hon. Daniel Webster. This assignment is charged to have been fraudulent; but the answers and the evidence show that it was made for a good and valuable consideration. And Mr. Webster assigned the bond and mortgage the 12th January, 1838, to the Bank of the United States. This assignment is, also, shown to have been bona fide, and for a valuable consideration.

And the question is raised by the complainant, whether the lots covered by this mortgage are not in the hands of the Bank of the United States, liable to the creditors of Turner, and to the payment of any amount that may be unpaid of the purchase money to the grantor.

As there was no fraud in the assignments they must be held valid; and, of course, the general creditors of Turner can have no claim on the property. If a lien had been given on it, subsequently to the above mortgage, the asserter of such a lien might claim the right to pay off the first mortgage, and hold the land subject to his own lien. To this, it is presumed, the Bank of the United States, or its assignees, could have no objection, as the property is not now worth, probably, one fourth of the amount paid for it by the bank.

Neither the bank nor Mr. Webster had any notice, at the time of the assignments, of any equitable lien upon the mort-

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gaged premises. But, on general principles, the mortgagor may claim the same rights against the assignee of the mortgage as he could against the mortgagee. If he made a payment to the mortgagee, subsequently to the assignment, of which he has no notice, the payment shall be allowed against the assignee. And so if the mortgagor have any setoff or mutual credit against the mortgagee, it is not affected by the assignment. 2 Hov. on Frauds, 133. *Norris v. Marshall*, 5 Mad. Rep. 481. 2 John. Ch. 441, 479, 512.

But it is insisted that this general principle is controlled by an act of Illinois, passed the 3d January, 1827, "making promissory notes and other writings assignable."

The first section provides that promissory notes, bonds, due-bills, and other instruments of writing, for the payment of money or property, shall be assignable by indorsement thereon, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in the assignee, who is authorized to sue in his own name. By the fourth section, if the assignment be made before the instrument become due, the defendant is prohibited from giving in evidence the payment of any property or money before the assignment, unless he prove the assignee had notice of such payment at the time of the assignment. Nor, by the same statute, can the defendant set up a want of consideration, where the instrument was signed before it was due.

The provisions of this statute are peculiar. They place every description of instrument, for the payment of money or property, in regard to its negotiability, on the same footing as a bill of exchange or promissory note. The language of the act is broad enough to include bonds and mortgages; and, if it embrace them, the mortgage under consideration having been assigned to Mr. Webster before the money secured by it was

due, it must be held by him, and by the bank, as his assignee, free from the equity of the vendor.

The drafts drawn on Huntington and Campbell, and J. P. Huntington, amounting to the sum of sixteen thousand three hundred eighty two dollars and ninety nine cents, remain unpaid; and the inquiry is now to be made, whether the lots, conveyed absolutely to Turner, amounting to fifty thousand dollars, on the compromise, shall be made subject to the payment of these drafts. That the property mortgaged, and now in the hands of the Bank of the United States, or its assignees, is not liable to this demand, has been shown.

The property above conveyed, the 18th July, 1837, was mortgaged by Turner to Robert Campbell and Henry Scott, of the State of New York, in consideration of ninety thousand dollars. The condition expressed was, that the said Turner, his heirs, &c., shall pay to the said Campbell and Scott, their executors, &c., the above sum of ninety thousand dollars, with interest. A bond, corresponding with the mortgage, was executed at the same time, and, also, what purports to be a declaration of trust.

This paper, after referring to the mortgage, declares that it was executed to the said Campbell and Scott in trust for the following purposes, and they are declared to be trustees. And they are directed to pay certain debts to individuals specified, amounting to thirty thousand four hundred and twenty dollars, out of the moneys first realized upon said mortgage. • After making these payments the trustees are to hold the mortgaged premises, in trust, to pay unto the Bank of Michigan the residue of the money realized from the premises, should the mortgagor owe that amount to the bank. Any balance over that indebtedment was directed to be paid to the Bank of the United States on Beardsley's acceptances.

The mortgage was acknowledged the 19th of July, left for record the 25th, and recorded the 10th August, 1837. To the execution of the declaration of trust there was no witness, and it has not been recorded. And here a question arises, whether a declaration of trust is valid, under the statutes of Illinois, it never having been recorded.

By the 8th section of the act concerning conveyances of real property, passed 31st January, 1827, it is provided that every deed conveying real estate, which by any other instrument shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; but no benefit can be claimed under such defeasance, or other writing, unless it be recorded within thirty days after the deed shall have been recorded.

By the 15th section of the same act, all grants, bargains, sales, leases, releases, mortgages, defeasances, conveyances, bonds, contracts and agreements of, and concerning, lands, or whereby the same may be affected in law or equity, shall be recorded; and if not proved and recorded in twelve months, it shall be adjudged fraudulent and void against any subsequent bona fide purchaser.

And, afterwards, in the act abolishing the office of State Recorder, approved January 18, 1833, it was provided, in the 5th section, that, after the first day of August next, all deeds and other title papers, which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void, as to all such creditors, &c., until the same shall be filed for record in the county where the lands lie. The 7th section of the same act repeals all former laws on the same subject.

The defendant insists that the 8th section, above cited, can only apply where the deed is absolute upon its face, which is not the case under consideration. That the deed to Campbell and Scott is conditional, requiring the payment of ninety thousand dollars by Turner.

Scott, it seems, was a creditor to the amount of about four thousand dollars, and this, aside from the declaration of trust, was the only consideration on which the mortgage was given. This sum, however, is not stated in the mortgage, nor is there any reference to it. The consideration named is ninety thousand dollars, and that is the amount which Turner bound himself to pay to the mortgagees.

Now, such a transaction by an individual embarrassed, having no other foundation than the sum of four thousand dollars, would be held fraudulent against creditors. It would have the appearance of an attempt to place a large amount of property, under the pretence of paying a small sum, beyond the reach of creditors.

The 15th section, it is contended, applies only to subsequent purchasers. This must be admitted, looking only to the provisions of that section. But the fifth section of the act of 1833 declares, that all deeds and other title papers, required to be recorded, shall take effect only from the time of filing such papers for record. And such papers are declared to be void against creditors, until they shall be recorded.

Now, is this declaration of trust, a paper, which the law required to be recorded? The 8th and 15th sections of the act of 1827, above cited, would seem to leave no doubt upon this point. The inquiry is not what is the effect, under either of these sections, if the paper be not recorded, but does either of them require it to be recorded? In this respect the provision of the 15th section is as broad as words can make it. All grants, bargains, sales, leases, releases, mortgages, defeasances,

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conveyances, bonds, contracts, and agreements of, and concerning lands, are required to be placed upon the record. The 8th section is equally comprehensive, though less explicit. And if these sections, or either of them, embrace this declaration of trust, the 5th section of the act of 1833, declares, that it shall have no effect against creditors until recorded. Is not the complainant a creditor? As vendor he stands in the most favored relation of a creditor. He has a lien upon the land sold for the whole or any part of the purchase money that remains due. And this lien may be enforced against any purchaser of the land with notice.

The argument that because one condition is expressed in the mortgage deed, the other conditions expressed on a separate paper, and on which, only, the deed could be held bona fide, need not be recorded, can not be sustained. It can not be sustained under the 8th section.

The mortgage deed does not show the trust. It purports to secure a debt of ninety thousand dollars due to the mortgagees. There is no intimation that this large sum of money is to be held or applied for the benefit of others. There is no such trust apparant or implied from the deed. Now, what is the object of a defeasance? Is it not to show the nature of the contract? If a trust be created it shows the character and extent of it. And this is shown by the declaration of trust under consideration. Does not the 8th section require such a paper to be recorded? Does it not essentially affect the deed of mortgage. By the deed the money would seem to belong to the mortgagees. But the declaration shows they hold it in trust for certain creditors.

The eighth section should not be so construed as to require a declaration of trust to be recorded, only, when it is connected with an absolute deed. The spirit and policy of the provision equally applies to a declaration of trust which materially

affects the deed; which, in fact, gives a different effect to the deed from what its words import. Such a paper is as much within the law as if it were connected with an absolute deed. In both instances it modifies the deed. It creates rights which are not found in the deed. How then can the same paper, producing the like effect in both cases, be held to be within the law in the one case and not in the other? Notice, which the law intended, is necessary in both cases. But without relying upon the eighth section the paper comes clearly within the provisions of the fifteenth section. This is sufficient. It takes no effect until filed for record, as against creditors.

The defendant insists that the complainant has an adequate remedy at law. And that suits of attachment are now pending which will give him full relief.

The ninety thousand dollar mortgage is a sufficient ground for an equitable jurisdiction. Until the apparent lien under that instrument shall be set aside, or postponed, no part of the property covered by it could be safely purchased. There are other considerations arising out of the case which go to sustain the jurisdiction of the Court.

But little attention seems to have been paid to the mode of proceeding in this case, or to the citizenship of the parties.

New matters are set up in the answer to operate as a crossbill, and to these, answers are filed by new parties.

This is the course of practice in Kentucky, and in some of the other States, but it is not the established English practice. And this Court and the Supreme Court are governed, in chancery, by the English practice.

A crossbill is filed to bring more fully before the Court a subject matter connected with the case made in the bill, and which is necessary to a determination of the controversy. The necessity of a crossbill may arise as well between two

defendants, as between one or more defendants and the complainant. Mitford's Pl. 81.

There is an instance in the case of *Fife v. Claydon*, 13 Ves. 546; 15 Ves. 525, where a court of chancery, contrary to the old practice, gave the benefit of a crossbill to a defendant upon his answer. But this seems to be a departure from the general rule. Hinde. Pr. 54. 1 Atk. Rep. 21.

In this case there are no matters set up in the answers referred to, perhaps, that would not be appropriate to the matter of the bill, or might be used as depositions on the hearing. In a case which interests so many parties as this one, and embraces so many, and complicated facts and circumstances, mere form should, as far as possible, be dispensed with.

The pleadings should always state the citizenship of the parties to show the jurisdiction of the Court. As between citizens of the same state the Court can exercise no jurisdiction.

The complainant is a citizen of Illinois, and Turner, the defendant, is a citizen of New York. But where several of the other defendants reside is nowhere stated. If any of them are citizens of Illinois the Court can have no jurisdiction between them and the complainant. By the act of the 28th February, 1839, the jurisdiction of the Court is extended in certain cases, but that act has no application to the parties in this case. As between the plaintiff and citizens of States, other than Illinois, the Court may exercise jurisdiction, where the defendants voluntarily file their answers, as has been done in this suit.

The money sought to be recovered by the complainant is due to him and others for whom he is agent. He acted under a power of attorney which authorized him to sell and convey the property, and in all other respects to act in the premises. The unpaid drafts were drawn in his favor, and his interests

are mixed up with the others. Under the circumstances, we think, the suit may be well sustained in the name of the complainant, in the form which he has brought it. The history of the present case affords a striking exemplification of the ruin which generally follows a most extravagant and visionary estimate as to the value of property. Under such circumstances the judgment seems to be overthrown, and dreams of imaginary wealth take possession of the mind. It is, indeed, a species of madness, from the influence of which but few are exempt.

The property purchased by the defendant is not now worth, perhaps, one fourth the amount which he either paid or agreed to pay for it. But this is a hardship for which the law can give no relief. Whether the value of property shall advance or decline is a matter of calculation and risk by the vendor and purchaser. The law can only look at the contract. If it has been fairly entered into, it fixes the rights of the parties, and the rule for the action of the Court.

As against the claim of the vendor for the residue of the purchase money, on the property conveyed to Turner, the mortgage executed by him can afford no protection beyond the demand of Scott the mortgagee. The declaration of trust not having been recorded, under the statutes of Illinois, is inoperative against creditors. And the complainant must be viewed in the light of a favored creditor.

The Court will decree the sale of so much of the property conveyed to Turner, by the complainant, for himself, and as agent, in July, 1837, as shall pay the residue of the purchase money. The property to be sold in lots, after giving days notice, as the rule requires, and agreeably to the requisites, and subject to the conditions, of the laws of the State. The sale to be subject to the lien of Scott, under the mortgage, for the amount due him, which amount shall be first paid from moneys realized by the sales.

And a reference is made to the master to ascertain that amount, and the amount of the four drafts drawn on Huntington and Campbell, and J. P. Huntington, including interest, damages, and costs of protest. From this amount he will deduct the amount of the mortgage of Hugunin and Pearce, unless the same shall have been reassigned to Turner. This mortgage was assigned to secure the payment of the draft on Mr. Webster, but the complainant failed to give the security which he was bound to do before the maturity of the draft for its repayment, and he was, consequently, not entitled to the proceeds of the draft. The amount of the above mortgage must, therefore, be accounted for by the complainant, by deducting it from the balance of the purchase money due.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1841.

TAGGART vs. STANBERY.

The consideration acknowledged to have been received on the face of a deed of conveyance, does not estop the grantor from showing, in an action for the purchase money, that the consideration has not been paid.

So far as regards the effect of the deed, the consideration named can not be controverted.

A possession, without claim of title, can afford, from mere lapse of time, no presumption of right.

A purchaser who has received a deed, and holds under it, can not set up a defect of title, to avoid the recovery of the purchase money.

A compromise of an outstanding claim, without the consent or knowledge of the grantor, can give no claim to an offset, in an action for the consideration money.

The liability of the grantor must depend upon the validity of the claim purchased in, and not upon the sum paid for it.

A power of attorney, which authorizes a conveyance to be made in as full and ample a manner as the principal could execute, authorizes a deed to be made by the attorney, with covenants of general warranty.

This is especially the case where the deed has been accepted, with a full knowledge of the power.

Such instruments are to be construed according to the intent of the parties.

Mr. *Taylor* appeared for the plaintiff, and Messrs. *Hunter* and *Stanbery* for the defendant.

OPINION OF THE COURT.

HENRY GRAHAM purchased from the plaintiff, through his agent, Wallace, a certain tract of land, for which he promised

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to pay six hundred and nineteen dollars, two hundred and twenty one dollars of which were paid the 11th November, 1831. The defendant, Stanbery, purchased Graham's right, and assumed to pay the balance of the purchase money.

In one of his letters to Wallace, as agent of the plaintiff, the defendant stated that the title was involved by a claim of Samuel Kirkland, who was in possession of the premises, and had been in possession for a number of years; and he proposed to pay one half the amount due, and take a quitclaim deed, or to pay the full amount, and receive a deed of general warranty. And, as it would be difficult to prosecute a suit in the name of Taggart, against Kirkland, he requested the agent to forward him a deed for the land, and proposed to secure the payment of the balance of the purchase money by a mortgage, or in some other mode. The deed was forwarded, containing the ordinary covenants of warranty.

This action was brought to recover the residue of the purchase money assumed by the defendant. The declaration contained the common money counts, and three counts on the contract. Defendant pleaded nonassumpsit.

Sometime after the deed was received by the defendant, he compromised with Kirkland, and paid him, for his right, four hundred dollars.

Several questions of law were raised in the course of the trial, which were decided against the defendant, and which were, more at large, considered on a motion for a new trial. Under the instructions of the Court, the jury found for the plaintiff the above balance, including interest.

A motion was made for a new trial on four grounds—

First: Because the Court admitted evidence to show that the consideration had not been paid, in contradiction of the deed;

Second: Because the verdict is against evidence;

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Third: Because the defendant was surprized by the rejection of the deposition of Samuel Kirkland;

Fourth: Because the letter of attorney to Wallace, by Taggart, did not authorize him to make a deed of warranty for the land.

The deed, in the ordinary form, states the consideration money, and acknowledges the receipt of it, and, from the payment of the same, acquits and discharges the defendant and his heirs. And this, it is contended, is conclusive evidence of the payment of the consideration, and that the plaintiff is estopped from denying the same.

The case of *Baker v. Dewey*, 1 Barn. & Cres. 704, is cited to sustain this doctrine. In that case it was held that a party, who executes a deed, is estopped, in a court of law, from saying that the facts stated in it are not true; that, as the deed expressly stated the consideration for the purchase had been paid, he was precluded from saying that any part of it was due. And, to the same effect, is the case of *Rountree v. Jacob*, 2 Taunt. 154. The same principle is affirmed in *Lampon v. Corke*, 5 Barn. & Ald. 606. 1 Greenleaf's Rep. 1.

In England, it is usual to take a receipt, on the back of the deed, for the payment of the consideration; but this had no influence in the above cases. In one of the cases it is said that the receipt, not being under seal, is no estoppel, and its truth may be disputed.

There can be no doubt that, so far as regards the effect of the deed, the grantor is estopped from denying the consideration named in it, and which is essential to its validity. This would be to deny a fact admitted in an instrument of the highest solemnity. But such is not conceived to be the rule, where the payment of the consideration becomes a question collateral to the deed.

A vendor being satisfied with the ability of the purchaser, executes a deed, and takes a promissory note for the purchase money. Now, according to the above decisions, this note would be in contradiction of the deed, and, therefore, could not be received as evidence. This would be contrary to the common understanding and practice of the parties to the deed. And the correctness of any principle of law may well be doubted, which is so diametrically opposed to the common sense of business men.

To give effect to a deed, a consideration must be stated or proved; but the parties are not bound to state the consideration paid. It may be more or less, but this does not affect the deed. Having a consideration named on its face, at law, the grantor can not question the payment of the sum named, in any case, to affect the validity of the deed.

In the case of *Shephard v. Little*, 14 John. 210, the Court held, where the consideration of a conveyance is expressed therein, and that it was paid by the grantee or assignee, parol evidence is, notwithstanding, admissible, to show that it had not been paid. To the same effect are the following cases: *Oneal v. Lodge*, 3 Har. & McHen. 433. *Jordon v. Cooper*, 3 Serg. & Rawle, 564, 570. *Wilkinson v. Scott*, 17 Mass. Rep. 249. *Bowen v. Bell*, 20 Johns. Rep. 338. *Pritchard v. Brown*, 4 N. Hamp. Rep. 397. *Gully v. Grubbs*, 1 J. J. Marsh, 388, 390. *McCrea v. Purmort*, 16 Wend. Rep. 460. *Lingon v. Henderson*, 1 Bland's Ch. Rep. 249. *Steele v. Worthington*, 2 Ham. Rep. 182. *Whitbeck v. Whitbeck*, 9 Cowen's Rep. 266, 270.

Under the second ground for a new trial, that the verdict was against evidence, the defendant insists that the title of the plaintiff was shown to be invalid; that the possession of Kirkland commenced in 1809, or the beginning of the year 1810, and was continued up to 1824. The defendant purchased his

right, by virtue of which he entered in the possession of the land, and has, ever since, occupied it. This possession, it is contended, is, of itself, sufficient to bar, by lapse of time, the title of the plaintiff.

And to show that this defence may be set up, to an action for the purchase money, the case of *Carpenter v. Bailey and Bailey*, 17 Wend. Rep. 244, is cited. In that case the Court held, where a vendor covenanted to procure from a third person, a good and sufficient warranty deed of conveyance, for a certain tract of land, together with certain water rights and privileges appurtenant to the land, particularly enumerated in the contract, and to deliver the deed by a fixed day to the purchaser, who, on receiving the same, had agreed to pay part of the consideration money, and to receive the residue by bond and mortgage, it was held, in an action by the vendor against the purchaser, to recover a part of the consideration money, that, in reference to the peculiar terms of the contract in the case, a plea of want of title in the grantor was a good and sufficient answer to the declaration—in other words, that the plaintiff was bound to procure a deed, not only corresponding in form with that stipulated for, but operative and effectual, to convey the title. But, in the case of *Harrington v. Higgs and Peck*, reported in the same volume of Wendell, 376, the Court held, where, by the terms of a contract for the sale of land, the purchase money is to be paid by instalments, and the first instalment falls due previous to the time limited for the execution of the conveyance by the vendor, and a suit be brought for the recovery of such instalment, want of title in the vendor is no bar to the action.

As the evidence does not show a want of title in the plaintiff, it becomes unnecessary to decide on the legality of such a defence.

From the evidence, it does not appear that the possession of Kirkland was hostile to the plaintiff's title. He may have entered, as tenant, under the title of the plaintiff. No color of right is shown, except the possession.

But, if a defect of title in the plaintiff were shown, we are of the opinion it could not avail the defendant in this action.

From the letters of the defendant, it appears that he was fully aware of Kirkland's claim; and, indeed, he says that it can not be sustained. But, having this knowledge, he expressly agreed to accept of a deed of general warranty, and pay the balance of the purchase money. And he did accept the deed, and he is now, and has been for many years, in possession of the land, holding under the deed. Under such circumstances, it is clear a defect of title can not be set up to defeat a recovery of a part of the consideration. The defendant can not resist the payment of the consideration, while he remains in possession of the premises, claiming under the deed of the plaintiff. Should he, at any future time, be evicted by a paramount title, his remedy will be on the covenants of the deed.

A covenant to make a deed must, generally, mean more than an instrument duly executed. The object of such a contract is substance, and not mere form. A deed, therefore, that shall give not even a shadow of title, can not, except under a very special contract, be held to discharge an obligation to make a deed.

The four hundred dollars paid, or agreed to be paid to Kirkland, can not be received as an offset to the demand of the plaintiff. The compromise with Kirkland was made without the assent or knowledge of the plaintiff. Under this compromise, therefore, the defendant can raise no charge against the plaintiff. It was not for the defendant and Kirkland to measure the value of the latter's claim to the land, and, by that means, create a demand against Taggart. And if, in any form, the de-

fendant shall be able to establish a charge against the plaintiff on this ground, it must be by establishing the claim of Kirkland, and not by the estimate of its value, which has been made.

The defendant can not complain of surprise, at the rejection of Kirkland's deposition. That deposition could only be read by consent, and consent seems not to have been given.

Did the power of attorney, under which Wallace executed the deed to the defendant, authorize him to make it with a general warranty? The deed contains the common covenants of warranty. The power of attorney authorized Wallace to sell and convey the lands of the plaintiff in Ohio, in as full and ample a manner as could be done by himself.

It is insisted that this authority does not extend beyond the power to convey the title of the plaintiff, and that the warranty is not binding on him.

It is a principle no where controverted, that, if an agent exceed his authority, he does not bind his principal. In the case of *Nixon v. Hyserott*, 5 John. Rep. 58, a case relied on by the defendant, the Court held that a power to sell does not, itself, convey a power to warrant the title. So, where the agent was specially authorized to sell a ship, in the same manner that the principals might have sold her, they were held not to be bound by the representations of the agent, that the ship was registered, when, in fact, it was a coasting vessel. *Gibbon v. Colt*, 7 John. Rep. 390.

In the case of *Nixon v. Hyserott*, the attorney was authorized "to execute, &c., such conveyances and assurances in the law, &c., as should, or might be needful or necessary, according to the judgment of said attorney." The conveyance, executed under this power, contained covenants of seizin, warranty, &c., and the Court held that a conveyance or assurance is good and perfect, without either warranty or personal covenants; and, therefore, they are not necessarily implied in a covenant to convey.

Between that case, and the one under consideration, a distinction may be drawn; but doubts are entertained, whether that case is sustainable on principle or authority. There was not merely an authority given to convey, but to make such conveyances and assurances as might be needful or necessary, in the judgment of the attorney. Now, here was a reference to the judgment of the attorney, as to the nature of the conveyance to be executed; and a bona fide exercise of his judgment, in this respect, should have been held to bind the principal. That such was the intention of the power, as understood by all the parties, can scarcely be doubted. If such were not the case, why was the discretion of the attorney referred to in the power? It may well be supposed that he could not have sold the land for the price received, had he agreed to execute only a general release, or deed of quitclaim.

Sugden on Powers, 459, lays down the rule that, "in considering the extent of a power, the intention of the parties must be the guide. Thus, on one hand, a power limited in terms, has, in favor of the intention, been deemed a general power; whilst, on the other hand, a general power, in terms, has been cut down to a particular purpose."

The creation, execution and destruction of powers, depend on the substantial intention and purpose of the parties. *Bristow v. Ward*, 2 Ves. Jun. 336. *Talbot v. Tipper*, Skin. 427. *Mildmay's case*, 1 Co. 175, a. *Long v. Long*, 5 Ves. 445.

In the case of *Wilson and others v. Troup and others*, 2 Cowen, 185, in the court of errors, a power of attorney from Wilson to Faulkner, which authorized him to receive a deed from Williamson, for the land purchased, and to sign, seal, deliver, and acknowledge to the said Williamson, a mortgage, or mortgages of said land, together with a bond, or bonds, for the consideration money, and to do and perform all things necessary and lawful to the obtaining a title to the said land, and

securing the consideration money therefor to the said Williamson."

A mortgage was executed by the attorney, which gave a power to the mortgagee to sell, on default of payment; and, under this authority, the premises were sold.

It was contended that the power to sell was not a necessary part of the mortgage, and that the attorney, by inserting it, exceeded his powers. And the case of *Nixon v. Hyserott*, was cited as sustaining this ground. With great plausibility, it was argued that the power to sell was no part of a mortgage, at common law, and that it was wholly unnecessary to the validity of the instrument.

In assigning his reasons for the decree, Chancellor Kent says: "A power to mortgage, is a power to give the same security, under that name, in as full and effectual a manner as the party himself, who created the power, could give. The letter of attorney was general in its terms; it was to give 'a mortgage,' and 'to do and perform all things necessary and lawful for securing the consideration money.' If the power to sell was usually inserted in a mortgage, as an ordinary and lawful part of it, under his general power to mortgage, the attorney could do what was necessary and lawful. Every thing incident to a mortgage, which Wilson himself could do, in and by the act of giving a mortgage, Faulkner could do, under the power."

In his opinion, Justice Woodworth says: "Faulkner must have understood the contract, as requiring a mortgage in the usual form. It would be a violation of the presumed intent of the parties to construe it otherwise." And the Court were unanimously of the opinion that the power authorized the execution of the mortgage.

In 2 H. Bl. 618, it is said that an authority is to be so construed, as to include all necessary or usual means of executing it with effect.

An agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer, so as to bind him by that indorsement. *Fenn v. Harrison*, 3 Term Rep. 757; 4 Term, 177.

A servant intrusted to sell a horse may warrant, unless forbidden. 5 Esp. Rep. 75. And it is not necessary for the party, insisting on the warranty, to show that he had any special authority for the purpose. *Alexander v. Gibson*, 2 Campb. 555. *Runquist v. Ditchell*, Ib. 550, n. 3 Esp. N. P. C. 64.

In *Liefe v. Saltingstone*, 1 Mad. 189; 1 Freem. 149, 163, 176, S. C., the testator devised his farm to his wife, for her natural life, and, by her, to be disposed of to such of his children as she should think fit. She conveyed the estate to her son, in fee, and the power was held well executed, even at law. "The principle of the case was, that where the deviser gives to another a power to dispose, he gives to that person the same power that he, himself, had to dispose."

If a tenant, for life, has power to grant leases, "requiring the best improved rents," he may cause to be inserted, in the leases, the usual covenants for payment of the rents, and a clause of re-entry, upon nonpayment, though the power be silent as to any covenants of that kind. These incidental provisions are considered as implied in the power of leasing. *Jones v. Verney*, Willes' Rep. 169. *Taylor v. Harde*, 1 Burr, 125. In *Long v. Long*, 5 Ves. 445, it was held that a power to charge an estate with the payment of moneys for the benefit of the children, as he should think fit, would authorize a disposition of the estate itself.

The power under consideration authorized Wallace to sell and convey his lands, in Ohio, in as full and ample a manner as he could do himself. Now, does not this authorize the attorney to convey, with warranty? This is the ordinary form of conveyance in this country. And the grantor does not object to

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this execution of the power, but the grantee. And the grantee accepted the deed, being satisfied with its covenants, and with the power of the agent to make it. It is unnecessary to inquire whether the power of attorney was before the defendant, when he accepted of the deed. He had a right to inspect it, and, having taken the deed, he must be presumed to have been satisfied with the power.

And we can entertain no doubt that the covenants of warranty, in the deed, bind the grantor. The power of the agent was ample—it was general—to sell and convey his lands in Ohio. He was authorized to convey them, in as full and ample a manner as Taggart could himself convey them. Did not all the parties understand this power, as authorizing a conveyance, with warranty, in pursuance of the general practice of the country? We think that the instrument, looking at the circumstances under which it was given, and the objects designed to be accomplished by it, is susceptible of no other construction. The motion for a new trial is overruled.

DIBBLE, PRAY AND CO. *vs.* DUNCAN AND OTHERS.

A plea that the defendant, who was sued as principal, indorsed the note as guarantor and not as principal, being demurred to, it was held the plea was good.

The undertaking of the defendant was collateral, and he can only be made liable in the character assumed.

It may be doubtful whether parol evidence is admissible to show that a defendant is surety against the terms of the note.

But, if the intent with which the indorsement was made be doubtful, it may be explained by parol.

A special plea which amounts only to the general issue is bad.

But in the action of assumpsit there are many defences which may be pleaded specially or given in evidence under the general issue.

In special pleas in bar color to the plaintiffs' right must be given.

Messrs. *Brush* and *Gilbert* appeared for the plaintiffs, and Mr. Smythe for the defendants.

OPINION OF THE COURT.

THIS is an action of assumpsit. The declaration contained a count on a promissory note, one for goods sold and delivered, another for money had and received, &c.

Two pleas were filed: First, the general issue, and secondly, Duncan pleaded that he was not a joint maker with the said Converse and Biskey of said promissory note, nor was he in any wise interested in the subject matter of said contract, but that his name was placed upon said promissory note as an indorser merely and guarantor of the payment of the same.

The plaintiffs demurred to this plea, and assigned the causes of demurrer as follows:

First: That the plea amounts to the general issue.

Second: It states a conclusion of law.

Third: If the facts alledged be true they constitute no bar.

It may be admitted that the matters set up in the plea might be proved under the general issue, but it does not follow that the special plea is therefore improper. In the action of assumpsit there are many defences which may be pleaded specially or given in evidence under the general issue. Of this character are all such matters as go to discharge the action; such as infancy, a release, want of consideration, accord and satisfaction, foreign attachment, or that a higher security had been given, payment, &c.

A special plea which amounts to the general issue is bad; and, therefore, a special plea must give express or implied color to the plaintiffs' right, and not deny it as is done by the general issue. By the Reg. Gen. Hil. T. 4 W. 4, all matters in defence, in England, except a denial of the promise, are now re-

quired to be pleaded specially; and this is justly considered a great improvement in the rules of pleading.

The plea in this case admits the signature of the defendant on the note, but alledges that it was placed there as a security and not as principal. And this is admitted by the demurrer. Now if the defendant, Duncan, undertook, as guarantor, to pay the note, and not as principal, he can only be made liable in the character he assumed. As guarantor he was entitled to notice, and it is incumbent on the plaintiffs to show that they have used legal diligence.

The plea gives color to the plaintiffs' right, and, it therefore, does not amount to the general issue. As regards the present action, the effect of the plea, if true, may be the same as the general issue; but the form is substantially different.

In many cases it is advisable to plead specially rather than to give the facts in evidence under the general issue, as it may narrow the grounds of defence. The plaintiffs are called upon either to admit or deny the special matter pleaded.

In pleading facts only are to be stated and not arguments, or inferences, or matter of law. Should a matter of law be stated it may be regarded as surplusage. It is not perceived, however, that the above plea is liable to this objection. 1 Chitt. Pl. 245, (edt. 1837.)

In the case of *Bright v. Carpenter et al.*, 9 Ohio Rep. 39, it was held "that where a stranger to a promissory note indorse it in blank at the time of making it, the payee of that note may sue him with the maker as a joint maker of the note and he is entitled to the privileges of a surety."

"That such blank indorsement may be filled at any time in form to oblige the indorser as principal, or the Court may regard it as so filled up. And that parol proof was admissible to show the intention of the parties as to the extent of the indorsee's liability."

And in *Dean v. Halt*, 17 Wend. 214, "where a note was made by A, payable to B, or bearer, C indorsed it, and an action was brought by a third person claiming, by transfer, from B, charging C as the maker of the note, it was held, on demurrer, that the declaration was bad."

"It seems that where an indorser to such a note is privy to the consideration he may be charged directly as maker or as indorser, and that a bona fide holder may, in all cases, write a bill of exchange over the name of the indorser, or fill up the blank in any form consistent with the intent of the parties."

It is objected to the plea that it does not alledge the defendant signed the note as guarantor after its execution. The plea states that the defendant was not in any wise interested in the subject matter of the contract, but that he signed it as guarantor. This, we think, is sufficient. It shows that the undertaking of the defendant was collateral, and that he cannot be sued as principal.

It may be doubted whether, on general principles, evidence is admissible to show that the defendant is surety when, by the terms of the note, he appears to be a principal. In *Laxton v. Peat*, 2 Campb. N. P. 185, it was held, that an acceptor of a bill of exchange might show that he was merely an accommodation acceptor. And under this authority the case of *Collett v. Haigh*, 3 Campb. 281, was decided; but these cases were overruled in the case of *Fentum v. Pocock*, 5 Taunton, 192. In *Rees v. Berrington*, 2 Ves. Jun. 540, Lord Loughborough says, "where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety; and to this effect is the case of *Garrett v. Jull*, Selwyn N. P. 393.

It is not important on what part of the note a guarantor shall sign his name. It may be placed on the back or face of the note; and the intent with which the name was indorsed, it would seem, might be shown by parol. There could be no

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doubt of this if the effect of the indorsement was in itself doubtful, and the note was in the hands of the payees. This would be in explanation of the indorsement, and not against its terms or legal effect.

As appears from the plea the defendant, Duncan, was not privy to the consideration, and the case in Wendell, above cited, sustains the plea.

The decision from the Ohio reports, in the admission of parol evidence, may have been influenced by a statute which requires an execution to be levied first on the property of the principal.

Upon the whole we think that the demurrer to the plea must be overruled.

HANK vs. CRITTENDEN.

The defendant guarantied to the holder of certain certificates of stock in the Portage Hydraulic Manufacturing and Land Company, ten per cent. on moneys paid for two years—held that an averment that, within the time specified, the company neither made nor declared a dividend was insufficient.

The undertaking was collateral, and in all such cases a demand and notice are necessary to be averred and proved, or an excuse alledged, to charge the guarantor.

The total insolvency of the principal supersedes the necessity of a demand of the principal and notice to the guarantor.

Messrs. *Brush* and *Gilbert* appeared for the plaintiff, and Mr. *Andrews* for the defendant.

OPINION OF THE COURT, BY JUDGE LEAVITT.

THE declaration in this case is in assumpsit; and sets forth, in four special counts, the issuing of four several certificates,

by the Portage Hydraulic Manufacturing and Land Company, dated February 21, 1837, in the following form: "This is to certify that Hank and Niles have ten shares in the capital stock of the Portage Hydraulic Manufacturing and Land Company, on which one thousand dollars have been paid, transferable on the books of said company, by Hank and Niles, or their attorney, on the surrender of this certificate." It is then averred, that the defendant, on the same day, made an indorsement, on each of said certificates, as follows: "I hereby guarantee unto the holder or holders of the within shares, an annual dividend or income of ten per cent. for two years, from the 13th inst., for value received." Then follows an averment that said company, for two years after the said 13th of February, 1837, "neither declared nor paid any dividend or income whatever, of which the defendant had notice," &c.

The defendant has filed a demurrer to the declaration; and the first objection urged is, that no sufficient consideration for the promise or guaranty is alledged.

The principle is well settled, that in declaring on promises or contracts, which do not import a consideration, it is necessary to aver a good and sufficient consideration. Specialties, and bills of exchange and promissory notes, imply a consideration; and in such cases none need be averred.

The promise or guaranty in this case, not being embraced in either of these classes, it is necessary that a consideration should be stated. The only question is, whether this is sufficiently set forth in the declaration. It is not averred with the formality and precision usual in such cases; but the promise or guaranty, on which the action is founded, is copied in the declaration; and from this it appears to have been made "for value received." These words, it may be assumed, were not used without some design; and they clearly amount to an acknowledgment by the guarantor of a benefit received from the

other party, as the moving cause of the execution of the guaranty. And in this aspect of the case, we are of the opinion that a sufficient consideration for the promise, stated in the declaration, does appear.

It is, also, insisted, by the demurrant, that the declaration is deficient, because it does not aver a demand on the company for the payment of the dividends on the shares transferred to the plaintiff, and a notice to the defendant of such nonpayment.

The inquiry which must be decisive of this point is, whether the promise on which this action is founded is to be regarded as absolute or collateral. If it can be viewed as an unconditional promise to pay the plaintiff ten per cent. for two years, on the stock transferred, it is not necessary to aver a demand upon the company, for the dividends, as no such demand can be required to fix the liability of the defendant; but, if it is to be regarded as a promise to pay ten per cent. on the stock transferred to the plaintiff, in the event that the company shall fail to do so, it is clearly one of those collateral undertakings, in which it is the right of the promisor, before his liability attaches, that a demand should be made of the party for whom he undertakes, and that notice should be given of the failure of that party to pay. In this latter aspect the promise, under consideration, must be viewed. And thus considered, the principles applicable to it are the same that have been long and uniformly sanctioned by courts, in the numerous cases of commercial guaranties, heretofore decided, both in this country and in England. If an individual guarantee the payment of a note or bill, although the same strictness in regard to the time of making demand, and giving notice is not required as in the case of an indorsement of commercial paper, yet the demand and notice are held to be indispensable, unless an excuse, such as the insolvency of the maker or acceptor, be averred. And

it is, also, settled by repeated adjudications, that to make the writer of a letter of credit responsible for goods sold or advances made upon such letter, he must be duly notified of the acceptance of the letter, and of the amount of sales or advances made; and in default of such notice he is not liable. The position is believed to be sustainable upon principle and authority, that in all collateral undertakings, where the liability of the guarantor depends on the doing of some act by a third person, notice of a demand upon him, or an excuse for not making it, must be alledged.

The averment in the declaration that the company neither declared nor paid any dividend within the two years, mentioned in the guaranty, does not supersede the necessity of a demand. The undertaking of the defendant in its legal effect is, that a profit on the stock transferred, equal to ten per cent. per annum, for two years, shall be made; and that if no profit be made the guarantor will be responsible for ten per cent; or, if a less profit than ten per cent. is made, he will pay the guarantee the difference between that rate and the profit actually made. An averment, therefore, that the company neither declared or paid any dividend or profit, is not equivalent to an averment that no profit was made during the two years; and nothing short of this allegation, or, that the company was actually and notoriously insolvent, will excuse a demand on the company, and notice to the guarantor.

In this view of the promise or guaranty on which this action is founded, the assignment of the breach, as stated in the declaration, is defective. The rule on this subject is, that the breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with the import and effect of it. And if the breach vary from the sense and substance of the contract, and be either more limited or larger than the contract, it will be insufficient. In

the case before the Court the words of the guaranty as set forth in the declaration are: "I hereby guaranty unto the holder or holders of the within shares, an annual income or dividend of ten per cent. for two years from the 13th Feb., inst." The breach assigned is: "That the company, within the two years, neither declared or paid any dividend or income whatever." This averment does not negative the contract or promise, either in its words or according to its legal import. To make the averment coextensive with the promise or contract, according to its sense and substance, it should have alledged not only that the company did not pay or declare any dividend, but that it made no profit during the two years referred to. The allegation contained in the declaration may be strictly true, namely, that the company neither paid or declared any dividend; and yet, in entire consistency with that averment, a profit even exceeding ten per cent. may have been made by the company. If, instead of declaring and paying a dividend, the officers had deemed it more expedient to set aside the profits as a surplus or contingent fund; or, if such profits had been added to the capital stock, it cannot be doubted that this would have been a substantial compliance with the terms of the guaranty, although the company "neither declared nor paid any dividend whatever." It seems clear to us, therefore, that the averment of the breach of the guaranty in question is not coextensive with the contract; and that on this ground the declaration is defective. The demurrer to the declaration is, therefore, sustained.

Johnson and others v. Sukeley.

JOHNSON AND OTHERS vs. SUKELEY.

Where a vendee asks the specific execution of a contract for the sale of land, the vendor, having agreed that the deed should be made by him before the payment of the consideration, has no right to require the money to be brought into court.

Nor has he a right to have the money brought into court when he is in default.

A deed, or power of attorney, executed and acknowledged according to the laws of New York, is a good execution under the law of this State.

A power of attorney, to convey land in Ohio, is required to be recorded, by the statute, before the conveyance is executed.

At all events it must be recorded before a record is made of the deed.

A power which authorizes the attorney to sell and convey lands, does not authorize him to make a deed for lands previously sold.

Except, under peculiar circumstances, the Court will not compel a vendee to accept a deed executed by an attorney.

Messrs. *Goddard* and *Convers* appeared for the complainants, and Mr. *Curtis* for the defendant.

OPINION OF THE COURT.

THIS bill was filed to enforce the specific execution of a contract for the sale of certain lands, made by the defendant with Walter Turner, the 18th February, 1832. The defendant agreed to sell and convey to Turner 3,273 acres of land, at three dollars per acre. One third to be paid the first of May ensuing, with interest from the first of April, when good and sufficient warranty deeds were to be made. The balance, being secured, &c., to be paid in instalments. On the first of May three thousand two hundred and twenty two dollars were paid, and the interest. Turner entered into possession, and afterwards surrendered it to the complainants, who are still in possession. The 9th September, 1835, the complainants tendered the money due on the purchase, which was

refused by the defendant, on the ground that Turner and complainants had a controversy respecting the right to the land.

A motion was made by the defendant's counsel that a Receiver be appointed, and that complainants be directed to pay him the money due on the contract.

In support of this motion the defendant's counsel cite the case of *Clark v. Hall*, 7 Page's Ch. Rep. 382: "Where a bill is filed by the vendee against the vendor for a specific performance of a contract of sale of real estate, it is proper for the Court, in the decree against the defendant for a specific performance, to give the necessary directions to compel the complainant to perform the contract on his part, by ordering the land to be sold, &c. And if the proceeds do not pay the sum due that the vendee pay the balance."

This motion is made before the defendant has filed his answer. It is not known to the Court whether he will admit the contract set out in the bill or repudiate it. Whether, if the contract is admitted, he is able and willing, on his part, to perform it.

The first payment having been made within the terms of the contract, if the statement in the bill be true, and the residue of the purchase money tendered, there would seem to be no laches on the part of the complainants which can operate to their prejudice. Indeed, it would seem that the defendant is, himself, in default for not having made and tendered conveyances for the land as he was bound to do.

In *Birdsall v. Waldron*, 2 Edw. Ch. Rep. 215, it was held, that where a vendor lets a purchaser into possession, upon an understanding not to require the consideration until the purchaser has a title, he can not be called upon to bring the money into court. Nor can it be done where possession has been given without any stipulation made about the purchase money.

In *Gibson v. Clark*, 1 Ves. and B. 500, it was held, if a purchaser be in possession under a prior title, or the possession commenced independently of the contract of sale, and the vendor be guilty of laches in perfecting the title, he can not compel the purchaser to bring the money into Court. When a vendor is resisting performance, and does not recognize a bargain, such vendor can not compel the vendee to pay the consideration into court.

Nor will the purchaser be compelled to pay the purchase money into court before the completion of the title, where the vendor has voluntarily permitted him to take possession without any stipulation or agreement about paying the purchase money, for it was a folly to permit it. *Clark v. Elliott*, 1 Mad. Ch. Rep. 606. *Fox v. Birch*, 1 Meriv. 105.

In the present posture of the case it is clear that the defendant is not entitled to his motion. Nothing short of an admission of the facts in the bill, and a readiness on his part to make the conveyances, would authorize the interlocutory order asked by his motion. The motion is overruled.

The defendant's counsel then admitted the facts stated in the bill, and the equity of the complainants' case, and he presented to the Court a conveyance for the land executed by R. Sukeley, as the attorney, in fact, of the defendant.

To this the counsel for the complainants make the following objections:

First: The power does not appear to have been duly executed.

Second: It authorizes the attorney to sell and convey with the usual covenants of warranty, but not to convey lands previously sold.

Third: The power has not been recorded as the statute requires.

Fourth: Vendee not obliged to receive a deed executed by power of attorney.

There seems to be no sufficient objection to the execution of the power. It appears to have been signed by the defendant, duly witnessed and acknowledged before an officer in the city of New York, authorized by the laws of that State to take acknowledgments of deeds, and this, under the statute of Ohio, is a good execution of the instrument. The second objection is entitled to more consideration. The act of this State, of the 22d February, 1831, provides that all powers of attorney, authorizing the execution of any deed, mortgage, or other instrument of writing, for the sale, conveyances, &c., of any lands, tenements, &c., in this State, shall be recorded in the office of the recorder of the county in which such lands, &c., are situated, previous to such sale, or the execution of such deed.

This power of attorney has not been recorded, and it is difficult to obviate the positive provision of the statute. We are inclined to think, however, that the recording of the power of attorney before a record is made of the deed might be held sufficient. Under certain circumstances, perhaps, the deed might not be considered as taking effect until the power of attorney was recorded.

But it is not necessary to place the objection to the deed on the construction of this statute, as the third objection must be sustained. The power authorizes the attorney "to sell and convey all and singular the lands whereof the principal was seized in the State of Ohio, and to dispose of the same absolutely in fee simple, for such price, or sum of money, and to such person or persons, as he shall think fit and convenient; and, also, in the name of the principal, to execute and deliver such deeds and conveyances, for the absolute sale and disposal thereof, as the said attorney shall think fit and expedient."

Now, this power has no reference to land which had been sold, and only authorizes deeds to be executed of such land as the attorney should sell. For aught that appears the defendant may have unsold lands in Ohio, to which this power will strictly apply. It does not embrace the land purchased by the complainants. This is a fatal objection to the deed now tendered by the defendant.

Another objection is stated to the power, that it does not authorize the execution of a deed with general warranty, and the case of *Nixon v. Hyserott*, 5 John. Rep. 58, is cited and relied on. As the objection just considered is fatal to the deed, it can not be necessary to consider this one. And we the more readily pass it over, as a similar objection is considered somewhat at large in the case of *Taggart v. Stanbery*, decided at the present term.

The last objection that a vendee is not obliged to accept of a deed executed by a power of attorney is not without force.

In Sugden on Vend. 1 and 523, it is laid down that a purchaser is not required to accept a conveyance from an attorney, unless under peculiar circumstances.

As justly remarked, there may be a revocation, by death or otherwise, of this power. If the power authorized the making of the deed, it would be necessary for the Court to decide whether, under the circumstances, the deed should be accepted by the complainants. But as the power is defective this point does not arise.

The equity of the bill being fully admitted by the defendant, by his voluntary answer, it is unnecessary to take a rule on him for answer; and as the case is submitted to the Court for their order, it is decreed that the complainants shall pay the balance of the purchase money, including interest, either into the hands of the clerk of this Court, with the usual rate of exchange on New York, within months, or that they shall

tender the same to the defendant in the city of New York, which, in either case, shall be paid to the defendant on his delivering a good general warranty deed to the complainants for the land, as required by the contract.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1841.

LORMAN ET AL. VS. CLARKE.

The Circuit Courts of the United States derive their jurisdiction as well in chancery as at law, from the constitution and laws of the Union.

The laws and usages of a State, which, at law, constitute a mode of procedure in the Circuit Courts, derive their force from their adoption by Congress.

A State can not enlarge nor restrict the jurisdiction of the Courts of the United States. In those States where no courts having chancery powers exist, the chancery powers of the Circuit Courts are the same as in the other States. But the contract, or right, is governed by the local law, where it originated, and was to be performed.

This law, then, constitutes the law of the contract, and will be enforced by the Courts of the United States.

It does not give a capacity to these courts to exercise jurisdiction, but it fixes the rights of the litigant parties.

The jurisdiction is derived from the laws of the Union.

There is no principle of the common law which pervades the Union, and exists independently of the laws of the States.

This rule is found as adopted and modified by the laws and judicial decisions of the respective States.

If a local law, or usage, originate a new right, it may be enforced by the Courts of the United States, sitting within the State, by the exercise of a common law or chancery power, as the case may require.

The law of this State, which authorizes a judgment creditor, after return of execution, no property found, to file his bill for a discovery, and subject the choses in action, and equitable credits of the defendant, to the payment of this judgment, may be enforced by an exercise of the chancery powers of the Circuit Court.

The law may be considered as creating a new right which can only be enforced in chancery.

Lorman et al. v. Clarke.

There being no adequate remedy, under the statute, at law, this Court will give relief in equity.

This is no enlargement of the jurisdictional powers of this Court.

It is the application of its ordinary powers to the enforcement of a new right.

The remedy under the statute is clear.

OPINION OF THE COURT.

THE complainants set out in their bill that they obtained a judgment at law, against the defendant, for dollars, and having issued an execution against his property, it was returned that he had no property real or personal. And the bill states that the defendant has equitable interests, choses in action, and other property, which the complainants are not able to discover and reach by execution at law. That he has money and personal property, either in possession, or held in trust, and has equitable interests in real estate, the particulars of which are unknown; and the complainants pray a discovery and relief in the premises.

The defendant demurs to so much of said bill as seeks discovery and relief, touching the equitable rights and interests of the defendant, or any other part of the bill which seeks a satisfaction of the judgment, out of any other property than that which is subject to execution.

This proceeding is attempted to be sustained by the complainants on two grounds:

First: Under the statutes of this State;

Second: On general chancery principles.

The 25th section of the act of Michigan, in relation to a court of chancery, Revised Statutes, 365, provides, "that whenever an execution, against the property of the defendant, shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of proper-

ty, or things in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or things in action, or the payment, or delivery thereof, to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant."

And power is given to the Court to compel such discovery, prevent such transfer, and to decree satisfaction of the sum remaining due on the judgment, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him.

There are other statutes of the State which may have some bearing on the remedy thus provided, but it is not necessary, in deciding this case, to refer to them.

That, under the above statute, the Courts of the State, exercising chancery powers, may give the relief sought in this bill, on the facts stated, is admitted. But it is insisted that this Court, deriving its jurisdiction under the constitution of the United States and the acts of Congress, have no power to act in the case. That it is not in the power of a State Legislature to restrict, or enlarge, or, in any manner, to modify the equitable jurisdiction of the Federal Court. And a great number of authorities are cited from the decisions of the Supreme and Circuit Courts of the United States to establish this point. Without a particular reference to these authorities it may be admitted, in the broadest sense, that the equitable powers of this Court are derived from the Federal Government.

The second section of the third article of the constitution, declares, "that the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, &c. And it is well observed by Mr. Justice Story, that the uniform interpretation of the above clause in

the constitution has been, that by cases in equity are meant cases which in the jurisprudence of England are so called, as contradistinguished from cases at common law. So that in the Courts of the United States equity jurisprudence embraced the same matters of jurisdiction and modes of remedy as exist in England." 1 Story's Com. on Eq. 64, 65.

The act of Congress of 1792 declares, "that the modes of proceeding in suits of equity shall be according to the principles, rules, and usages, which belong to Courts of Equity, as contradistinguished from Courts of Law, except so far as may have been provided for by the act to establish the Judicial Courts of the United States." The 11th section of the act of 1789 gives to the Circuit Courts jurisdiction of all suits of a civil nature, at common law or equity, where the sum exceeds five hundred dollars.

In some of the States there is no Court of Chancery, but this does not effect the exercise of a chancery jurisdiction by the Federal Court in such States. This jurisdiction extends alike to all the States. And it gives relief, where plain and adequate redress can not be had at law, agreeably to the well established rule in the English Chancery. If a State were to authorize a chancery jurisdiction by her own Courts, in all controversies concurrently with a Court at Law, this would not enlarge the jurisdiction of the Federal Court of Chancery. It could only interpose its remedial powers where the remedy was inadequate at law.

The rules of practice of the High Court of Chancery, in England, have been adopted by the Supreme Court, and are obligatory upon the Circuit Courts. They have power, however, to adopt other rules not inconsistent with the general rules.

It is argued that, in the exercise of the powers thus given and defined, we must look to the settled principles of an

equitable jurisdiction in England; and that no relief can here be given which could not be given in that country. And that what a Federal Court of Chancery may do in one State it may do in another. That its jurisdiction not being derived from the laws of a State, its powers are in no respect influenced by such laws. That if a different rule were to prevail the Court would lose the national character which was intended to be given to it, by its organization under the laws of the Union.

The judiciary of the United States constitutes a co-ordinate and independent branch of the government; and its powers are co-extensive with the laws. It was designed, undoubtedly, to secure a uniform construction and enforcement of the laws of the Union. And in this respect, in all the States, the rule of decision is unvaried. But the Federal Court has jurisdiction between citizens of different States, as well as in cases arising under the laws of the United States. And where controversies are brought before it, which do not arise under the laws of the Union, by what law are they to be determined. The law of the contract is the law of the place where it was made and was to be executed. There is no unwritten or common law of the Union. This rule of action is found in the different States, as it may have been adopted and modified by legislation, and a course of judicial decisions. The rule of decision, then, must be found in the local law written or unwritten. No foreign principle attaches to the Federal Court when exercising its powers within a State. It gives effect to the local law, under which the contract was made, or by virtue of which the right is asserted. And this independently of any act of Congress adopting the modes of proceedings, at common law, of the State Courts. And the principle applies as well to proceedings in chancery as at law.

The term jurisdiction is often used, not very appropriately, more in reference to the subject matter of the contract, or

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right set up, than to the capacity of the Court. The capacity of the Federal Court, for the exercise of chancery powers, is received from the laws of the Union. It is not dependent for this, in any degree, on the local law. But these powers are exercised in all cases where the contract or right comes appropriately under them.

If a right exist within a State which can not be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the Federal Court. And it is immaterial whether a similar right has come under the action of a Court of Chancery in this country or in England. The right may be new. It may originate under a local statute or usage, and exist no where else. But this constitutes no objection to its enforcement. The inquiry is, is there no adequate relief at law, and does the right come within the powers of a Court of Chancery.

Now, can it be said that, in a case like this, the jurisdiction of the Court is derived from the local law. As in all other cases, which do not arise under the laws of the Union, the local law governs the contract or right, but the power to act on it is derived from the laws of the Union.

The Circuit Court of the United States have a general common law jurisdiction in a State. Their powers of common law and chancery are alike derived from the laws of the Union. For the laws of a State, and the modes of proceeding of its Courts, which form a rule for the Federal Court, at law, in the exercise of its jurisdiction, are in force, only, by reason of their adoption by act of Congress.

Now, to the exercise of this common law jurisdiction, can it be objected, that the right set up in the declaration is new, and has never before been asserted? Is not the proper inquiry, whether the right be a legal one; and, if it is, the action may be sustained? And if, in such a case, the plaintiff shall fail to

establish his right by proof, is the failure attributable to a want of jurisdiction in the Court? The jurisdiction to afford an ample remedy, at common law, is clear, but the case for the action of the Court must be made out by the evidence. The subject matter, then, on which the Court acts, is altogether distinct from its jurisdictional powers. The one is the contract, the other the powers by which it is enforced. The contract originates under, and is governed by, the local law; the jurisdiction is derived from the laws of the Union. And this view is applicable as well to the chancery as to the common law powers of the Circuit Court.

A reference to the decisions of the Supreme and Circuit Courts of the United States will show that this has been the settled course of action.

In the State of Kentucky land titles were generally acquired by the location of a warrant on a tract of land, giving a specific description of the beginning corner of the survey, and describing the boundaries. This was called an entry of the land, but it was indispensable to the validity of the entry that it should call for some object generally known in the nearest settlement. And if such object was not called for, the holder of a warrant could, subsequently, enter the same land, though he had full notice of the prior location. The well established doctrine of notice, in fact, was discarded, and the call in the entry, for an object generally known, was substituted for it. This was an innovation upon the principles of equity, but by the practice of the Courts of Kentucky it was established as a rule of property. This system was *sui generis*. It was an artificial superstructure reared chiefly by judicial action. New principles and modes belonged to it. It had no foundation in the jurisprudence of England. And yet this system was regarded, by the Courts of the United States, as the local law of property. And as the Courts of Kentucky considered an

entry as an equitable title, and gave relief to the claimant against an elder patent on a junior entry, for the same land, the Courts of the Union adopted the exercise of their equitable powers to the attainment of the same end.

In the case of *Bodley et al. v. Taylor*, 5 Cranch's Rep. 191, Mr. Chief Justice Marshall says—it has been sufficiently shown that the practice of resorting to a Court of Chancery, in order to set up an equitable against the legal title, received, in its origin, the sanction of the Court of Appeals, while Kentucky remained a part of Virginia; and has been so confirmed by an uninterrupted series of decisions, as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle can not now be shaken. And, he remarks, the jurisdiction exercised by a Court of Chancery is not granted by statute; it is assumed by itself. And what can justify that assumption but the opinion, that cases of this description come within the sphere of its general action. In all cases in which a Court of Equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. The Court, therefore, he says, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a Court of Chancery.

In Tennessee land titles were acquired by entry as in Kentucky, but in the former State the elder entry is regarded, when connected with a junior patent, as constituting a part of the legal title. So that in one of these States relief is given in equity, and in the other at law, on substantially the same facts. And such is the action of the Federal Courts in those States. This forcibly illustrates the influence of the local law. In one State the right is held to be equitable, in the other legal, and it is acted on accordingly, by the respective jurisdictions.

In the State of Kentucky a statute provides that, in certain cases, persons holding distinct titles may be united in the same action. And the Supreme Court have held, that under this statute parties may be united in a suit in chancery, who have no common interest. *Lewis et al. v. Marshall et al.*, 5 Peters, 470.

In the case of *Clark et al. v. Smith*, 13 Peters' Rep. 20, under the act of Kentucky of 1796, which provides, that any person having both legal title to, and possession of, land, may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, &c. The Court held it afforded ground for relief. They say the State Legislatures have no authority to prescribe the forms and modes of proceeding in the Courts of the United States; but having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as in the State Courts.

In Ohio a statute gives to a decree, for a conveyance of title, the same effect as a deed formally executed. But, in Kentucky, the conveyance, under a decree, is required to be executed by a commissioner, appointed by the court. These statutes have, uniformly, been considered as applicable to the Federal Courts, and many land titles rest upon them.

More authorities might be cited, if more were necessary, to show that the courts of the United States, in the exercise of their chancery powers, will enforce equitable rights, whether they originate by contract, by local usage, or by the statutes of a State. And the principle is the same, whether such rights relate to titles for land, or not. If full and adequate relief can

not be given at law, relief may be sought in chancery. It is important, and the Supreme Court have often said so, that, in regard to land titles, there should be but one rule of decision in a State. But the same remark may be applied, with equal force, to any rule of property. Whether the contract or right be equitable or legal, the same effect should be given to it in the Federal, as in the State Courts.

In the case under consideration, the statute declares, in substance, that all equitable rights, however held by the judgment debtor, may be reached by the plaintiff, to satisfy the judgment, by a bill in chancery. Now, these rights can not be reached by an execution at law; and if, as the defendant's counsel contend, they are not subject to the ordinary action of a court of chancery, still, under the statute, they are proper objects of chancery jurisdiction.

It is, unquestionably, in the power of a Legislature to subject the personal and real estate of the judgment debtor, to the payment of his debts, in such mode as they shall prescribe. And they have, in the above statute, subjected his choses in action, and other equities, with this view, to the action of a court of chancery. Here, then, is a right given to the plaintiff—a right which a court of law can not enforce, and which the statute declares may be enforced in equity. This right, then, by the statute, is brought within the action of a court of chancery, if it was not within it before. It is, therefore, an equitable right, made so by the statute, and which the Circuit Court, equally with a State Court, may enforce, by the exercise of its chancery powers.

In the language of the Supreme Court, in the above cited case of *Clark et al. v. Smith*, the Legislature having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Fed-

eral Courts, no reason is perceived why it should not be pursued as in the State Courts.

This authority covers the whole ground. Had the question, now under consideration, been before the Supreme Court, language more appropriate to its decision could not have been used. The right was created, and declared to be an equitable one. A court of chancery can act upon such right, in accordance with established principles, and the modes peculiar to its organization. But the Supreme Court say, even the forms of proceeding authorized by the statute, may be followed by the Federal Court, if not inconsistent with the rules of chancery.

It is the characteristic of a court of equity to regard substance more than form. Having jurisdiction of a subject matter, in the language of the late Chief Justice Marshall, it will exercise it upon its own principles.

We think the present bill is clearly sustainable under the statute, which gives to the complainant the discovery and the relief prayed for in his bill.

And we are also of the opinion, that the bill is sustainable on the general principles of equity, independently of the statute. It would, indeed, be a reproach to the administration of justice, if a debtor, by converting his estate into choses in action or stocks, or, if his estate consisted of such property as can not be reached by an execution, he should be able to hold it in defiance of his creditors.

At common law, an equitable estate can not be sold on execution; but who ever doubted that it might be sold, by a decree in chancery? And, in the case of *Vanness v. Hyatt et al.*, 13 Peters' Rep. 300, the Supreme Court say, that an equitable interest in personal property is governed by the same rule.

Being satisfied on the first ground, it is unnecessary to examine this one. It would not be difficult to show that, both on principle and authority, the second ground is sustainable.

The demurrer must be overruled.

Jasper and Tibbits v. Porter et al.

JASPER AND TIBBITS VS. PORTER ET AL.

The Courts of the United States are presumed to know the laws of the respective States and they will determine who, under the laws of the State, have a right, by the act of Congress, to take depositions.

The official character of the person taking a deposition will be presumed, without further proof.

OPINION OF THE COURT.

In this case an objection being made to the admission of certain depositions, on the ground that it did not appear that the officer, taking the same, was authorized to do so. The Courts of the United States are presumed to know the laws of the several States. It is, therefore, unnecessary to set them out in a plea, as foreign laws; but the Court will notice them without plea, and can determine whether the person taking the depositions, under the laws of the State, comes within the act of Congress, which authorizes depositions to be taken. The Court will receive the certificate of such person, as prima facie evidence of his right to take the depositions, without the certificate of the clerk and seal of Court, or any other evidence of his official character.

Under the 61st rule, all objections to the form of taking depositions are waived, unless indorsed on the depositions before the cause, in which they were taken, shall be called for trial.

Dwight v. Wing and Miller.

DWIGHT vs. WING AND MILLER.

A venue in the body of the declaration is sufficient, without being stated in the margin.

By the present rules of pleading in England, a venue is laid only in the margin.

An averment of due notice, is sufficient to charge the indorser of a note or bill. Under such an allegation, proof of the facts may be made.

Mr. *Bates* appeared for the plaintiff, and Mr. *Joy* for the defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants, as indorsers of a promissory note, payable at the Bank of Michigan. To the declaration there is a demurrer, for the following reasons:

First: There is no venue set forth in the margin of the declaration;

Second: The averment of notice, of nonpayment, is not laid with certainty, as to time or place.

There is no formal venue laid in the margin of the declaration; but there is a venue in the body of it, and that is sufficient. By the rule adopted in England, Hil. T. 4 Will. 4, the venue, in the body of the declaration, is to be omitted, and it is laid in the margin only. Under this rule, the venue, not being laid in the margin, is ground of demurrer.

There is an averment of demand, of the drawer of the note, when it became due, and that due notice of nonpayment was given to the defendants. This is all the law requires. Under the averment of *due* notice, all the facts, in proof of that allegation, may be given in evidence. *Firth v. Thrush*, 8 Barn. & Cres. 387. 2 Man. & Ry. 359.

Demurrer overruled, and judgment.

Grutacap v. Woulluse. Lawrence v. The United States.

GRUTACAP vs. WOULLUSE.

On a promissory note given in New York, payable at Detroit, with the current rate of exchange on New York, the rate of exchange may be recovered.

Messrs. *Atterbury* and *Pitts* appeared for the plaintiff.

OPINION OF THE COURT.

THIS action was brought on a promissory note, dated New York, payable at the Detroit City Bank, for \$1,232, with the current rate of exchange, on the city of New York, to be added thereto. In the declaration, there was an averment of the current rate of exchange, when the note became due. The Court think the difference in exchange, between Detroit and New York, may be recovered on this note; and, unless the parties shall agree on the amount, the question will be referred to a jury.

LAWRENCE vs. THE UNITED STATES.

A transcript from the Postoffice Department, to show the indebtedment of a postmaster, need not contain a full copy of his quarterly returns.

In such return, the postmaster strikes the balance due by him, and this is sufficient to charge him.

Where the surety is charged with receipts, for postage, for a part of the quarter, the return for the full quarter is evidence, to show an average liability for a part of it.

A payment made, by a postmaster, of a greater sum than the receipts for the preceding quarter, should be applied as a credit for the quarter, as well before as after the date of the bond.

On a penal bond, a judgment can not be rendered beyond the penalty.

Lawrence v. The United States.

Mr. *Frazer* appeared for the plaintiff, and Mr. *Goodwin*, the District Attorney, for the defendants.

OPINION OF THE COURT.

THIS case is brought before this Court, by a writ of error, to the District Court.

The action was brought against Lawrence, as security on a bond, in the penalty of two thousand dollars, given by Adams, as deputy postmaster, dated the 21st February, 1837.

On the trial the District Attorney offered a transcript, from the books of the Postoffice Department, showing the amount of the defalcation of the late postmaster.

To the admission of this transcript, in evidence, the defendant objected—

First: Because it does not purport to contain copies of the quarterly returns of the postmaster, but merely a statement of his indebtment;

Second: Because it purports to contain a statement of the account of the postmaster, and an indebtment, on his part, anterior to the date of the bond.

And it is insisted that the Court erred in permitting the transcript to be read, as evidence, and, also, in its instructions to the jury—

First: By informing them that the whole of the transcript was evidence;

Second: By charging the jury that they should apply the credit, of \$708 69, under the date of 15th April, 1837, to the payment of the item on the debit side, of \$699 24, being for the quarter of the 1st January, to the 31st March, 1837;

Third: By instructing the jury that it was competent for the District Attorney to apply said credit to a prior indebtment of said postmaster;

Fourth: By charging the jury, if they found the balance due to exceed the penalty in the bond, they could find the penalty, and interest;

Fifth: By rendering judgment for the penalty and interest, found by the jury.

The counsel for the plaintiff in error insists that the admission of this transcript in evidence, being in derogation of the common law, should strictly conform to the statute; and, in support of this position, a reference is made to the case of *Smith v. The United States*, 5 Peters' Rep. 300. In that case, the Court say, where copies are made evidence by statute, the mode of authentication required must be strictly pursued.

Against the authentication of the transcript, in this case, there seems to be no valid objection. But, it may be admitted, that the body of the transcript must, substantially, conform to the statute.

The first question to be considered, is, the objection to the admission of the transcript, as evidence, because it does not purport to contain copies of the quarterly returns of the postmaster, but a statement of his indebtedment.,

These quarterly returns consist, on the debit side, of the gross amount received for postages during the quarter; and, on the credit side, are entered the commissions of the postmaster, the incidental expenses, and some other items; which, being deducted from the amount on the debtor side, shows the amount due, by the postmaster, at the close of the quarter. And this balance is stated, by the postmaster, in his return. That this amount is stated in the transcript, as an indebtedment against the postmaster, without enumerating the other items of the return, is the objection made.

If this balance were struck, by the accounting officers of the Postoffice Department, from the items composing the quarterly return, the objection would be fatal. For, in a case like the

present, it is not the action of the Department which is to bind the Department, but the judgment of the Court and jury, on the evidence on which that action was founded. The balance, charged, was struck by the postmaster himself, and acknowledged by him, in his return, to be the amount of his indebtedment. It does not, therefore, come within the rule, which requires the items in the original account to be certified, and not the balance ascertained by the accounting officers.

The next objection to the admission of the transcript, is, that it shows an indebtedment of the postmaster anterior to the date of the bond.

It is clear that the security can only be charged, for defalcations of the postmaster, subsequent to the date of the bond. But the bond bears date the 21st February, near the middle of the quarter, which commenced the 1st January, 1837, and ended the 31st March; and, as the postmaster is not required to keep an account of the receipt of postages, except the gross amount within the quarter, the sum received, from the date of the bond to the close of the quarter, can only be ascertained by an average estimate on the sum received during the quarter. To enable the jury to make this estimate, it was proper to admit the transcript, in evidence, which showed the amount of postages received for the quarter.

And, in this view, the instruction of the Court to the jury, that the whole of the transcript was relevant and proper evidence, which is objected to, was right.

The second instruction, that the jury should apply the credit of \$708 69, under date the 15th April, 1837, to the payment of the item of \$699 24, on the debit side, is also objected to.

The latter sum was the net amount of postages for the quarter. Payments are made by postmasters, either on the drafts of the Department, or by deposits in some bank, as directed; and credits are given at the time of such payments or deposits.

The above credit was given the 15th of April, and the question is, how it should be applied.

That this sum included the postages received for the entire quarter, is apparent; and it is equally clear that it was properly applied, under the instruction of the Court, in discharge of postages received for the quarter, as well before as after the date of the bond. At the time of the payment, two weeks of the new quarter had expired, and the sum paid must have included a part, or the whole, of the postages received during that time. It is in this way that the excess of the payment, over the amount due for the preceding quarter, is accounted for.

This was an application of the credit not only authorized, but required, from the face of the transcript. It can not be supposed that the postmaster paid the above sum in advance of the receipts of his office; nor is there any doubt as to the intent with which the payment was made by him, and received by the Department. And, where this is the case, there is no occasion to refer to the general doctrine, as to the right of the one party, or the other, to make the application of the payment.

The two last exceptions to the charge, that the jury could find interest on the penalty of the bond, for which judgment was rendered, will be now considered.

There is some contrariety in the authorities on this point. In the case of *Lowe v. Peers*, 4 Burr. Rep. 2228, Lord Mansfield said: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has had his election. He may either bring an action of debt for the penalty, and recover the penalty; or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties." This point seems not to have been involved in that case; and it must be regarded, rather as a dictum by his

Lordship, than a solemn decision. But it is considered law by Espinasse, in the 2d vol. of his *Nisi Prius*, 279.

In the case of *Lonsdale v. Church*, 2 Term Rep. 388, where a motion was made to stay proceedings, on the payment of the penalties of the two bonds, on which suit was brought, Justice Buller expressed dissatisfaction with the decision, in *White v. Sealy et al.* Doug. 49, and cited *Collins v. Collins*, Burr. Rep. 820, and *Haldip v. Otway*, 2 Saund. Rep. 106, where the interest, beyond the penalty of the bond, was recovered by way of damages.

In *Graham v. Bickham*, 4 Dall. 149, and 4 Yeates' Rep. 32, it was held that where the penalty is not in the nature of stated and ascertained damages, the injured party may recover beyond the penalty. That case was brought on a contract, for the transfer of stock, not under seal. The same doctrine was held in the case of *Harris v. Clap*, 1 Mass Rep. 308. And in the case of *The United States v. Arnold*, 1 Gall. Rep. 348, 360, Mr. Justice Story says, "I think the true principles supported by the better authorities is, that the Court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." The judgment in that case was affirmed on a writ of error, but the above point was not considered. 9 Cranch's Rep. 104.

In *Martin v. Taylor*, 1 Wash. C. C. Rep. 1, the Court say, "in an action of covenant, on an agreement under a penalty, the jury, in estimating the damages, are not bound to give the penalty only; but where the penalty is in the nature of liquidated damages, the stipulated sum must govern the jury in estimating damages."

That damages may be recovered beyond the penalty is laid down in 4 Mass. Rep. 333. 7 Am. Com. Law Rep. 244 and 2, Ib. 441. 1 Paines Rep. 666.

There are many cases opposed to these decisions. In *Branquin v. Perrat*, 2 Bl. Rep. 1190, a motion was made to pay the penalty of the bond, when Chief Justice DeGrey observed, "this is really so plain a case that one knows not what to say to make it clearer. The bond ascertains the damages by consent of parties. In *White v. Sealy et al.*, Doug. Rep. 49, Buller concurred with Ashurst and Lord Mansfield that the defendants were liable only for the penalty. In the case of *Tew v. The Earl of Winterton*, 3 Browns Ch. Rep. 490, and in *Knight v. Maclean*, (Ib. 596,) Lord Thurlow held that the penalty was the extent of the obligor's liability.

Afterwards, the King's Bench, in *Wilde v. Clark*, 6 Term Rep. 303, decided that more than the penalty could not be recovered. Lord Kenyon said, "I cannot accede to the case of *Lansdale v. Church*." The same principle was recognized in *McClure v. Dunkin*, 1 East. 436, and in *Hefford v. Alger*, 1 Taun. Rep. 218. 2 Wash. Rep. 143. *Executors of Barney v. Bush*, 3 Cowen's Rep. 151. *Foisler et al., Commissioners, &c. v. Lawson and Stanbery*, 5 Cowen's Rep. 424. 2 Wash. C. C. Rep. 323. But the decision in the case of *Farror and Brown v. The United States*, 5 Peters Rep. 385, is most authoritative on this Court. That action was brought on a bond, in the penalty of thirty thousand dollars, given by Rector, and signed by the plaintiffs in error as sureties for the faithful performance of the duties as Surveyor General. The jury found a verdict in favor of the United States for forty one thousand dollars, on which a judgment to recover the damages assessed was rendered.

The Supreme Court say, "it is perfectly clear that against the sureties a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is actually due; which, of course, can only be where it is a sum less than the penalty."

That a release of the excess of the damages would not cure the form of the judgment so as to authorize its affirmance.

This language cannot be misunderstood. It lays down, in express terms, that the judgment against the surety cannot exceed the penalty. And this equally excludes damages beyond the penalty, for interest or on any other ground.

The rule which gives interest on the penalty from the breach of the condition would seem to be reasonable; but as this would make the judgment greater than the penalty, it would be in conflict with the above decision. And it seems to be impossible to avoid the pressure of its authority.

Where the condition of a penal bond is not for the faithful application of public moneys, but for the performance of other duties, public or private, the damages could be ascertained only by the amount of injury sustained. In such a case it would be difficult to apply the rule that interest shall be recovered on the penalty from the time of the breach, should the damages be assessed to that amount. And the propriety of a rule of but limited application may be doubted.

Upon the whole, as the judgment of the District Court on the bond, against the plaintiff in error was for a larger sum than the penalty, it must be reversed.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1841.

RILEY AND VAN AMRINGE vs. ANDERSON.

A precedent debt constitutes a good consideration on the assignment of a note.

And although there may have been fraud or deception in obtaining the note, yet if the holder had no notice of it, the equities between the original parties are not open.

A note received in payment of a debt is a transaction in the ordinary course of business.

Circumstances may show that a note was given and received in payment of an account.

Messrs. *Stanbery* and *Hunter* appeared for the plaintiffs, and Messrs. *Goddard* and *Converse* for the defendant.

OPINION OF THE COURT.

THE following is a substantial statement of the facts admitted in this case. "Johnson, who resided in Martinsburg, Knox county, Ohio, in May, 1837, had for some years carried on an extensive business as a merchant. The 2d of January, in that year, he was indebted to the plaintiffs, citizens of Pennsylvania, in a sum exceeding three thousand dollars for money loaned; and Van Amringe called upon him, at Martinsburg, for payment, but obtained nothing. On that day Van Amringe and Johnson rode together to Nashport, where the defendant, Anderson, resided and kept a store, in connection with Johnson. They arrived late in the afternoon, and took lodgings near the store. In the evening Johnson called on Anderson

and inquired if he did not want money; Anderson replied he could use it if he had it. Johnson then said he was going to Zanesville the next day and would try the banks; that it was best to draw two notes for fifteen hundred dollars each, and if he could get the three thousand dollars, one thousand should go to the Nashport establishment. He then wrote in figures \$1500 at the top of the left hand of two pieces of paper, and he and Anderson and Shipley signed their names, following each other, to each piece of paper, on the right hand, some distance from the top, leaving room and intending to have promissory notes written over their signatures. Johnson took the papers, returned to his lodgings and handed them to Van Amringe, who dated them 2d January, 1837, and filled them up as notes for fifteen hundred dollars each—one at ninety days after date, payable to the order of the plaintiffs at the Bank of Granville; the other in like manner, at four months. Van Amringe and Johnson left Nashport the next morning, the former not having visited the store or met Anderson during his stay. He received the notes of Johnson in part of the plaintiffs' account against him, and gave him credit on account for \$3,000."

"The notes were left at the Granville Bank for collection, where they were protested for nonpayment, and the plaintiffs then charged them to Johnson. Up to May, 1837, Johnson was in good credit, and was supposed to have ample means to pay a sum much larger than was the amount of the two notes; but he shortly after absconded, being insolvent, and leaving the plaintiffs the above notes as the only security for their demand."

Sometime after the execution of the above notes, a contract was made between the plaintiffs and one David Cummins, of the State of Indiana, in which the latter, in consideration that the plaintiffs should not institute a suit against Johnson, and that they should place in his hands the above two notes to be

collected for his benefit, agreed to pay two thousand dollars and upwards of the debt of Johnson to the plaintiffs, &c.

This action is brought on the note payable in four months.

It is first objected that the contract with Cummins takes from the plaintiffs the right of prosecuting this action. But no such effect can be given to that contract. It gives the proceeds of the note to Cummins, and provides for the payment of the costs of any suit that may be brought upon it; but it gives the right to Cummins to sue in the name of the plaintiffs, as there was no regular indorsement upon the note.

The first ground taken is that this note having been given for a past consideration, leaves the equities between the original parties open.

This position is sustained by the Supreme Court of Ohio in *Riley and Van Amringe v. Johnson, Anderson and Shipley*, 8 Ohio Rep. 562.

That action was on the other note, payable in ninety days. As that case involved the same facts and circumstances, as the one under consideration, it is in point. The Court say, "the notes in question were not received in the usual course of trade, for a valuable consideration, in the meaning of those terms, applicable to such cases, but for a precedent debt. Failing in this suit, the plaintiffs lose nothing. They remain in the position they were in when they took the notes, and may sue on their original cause of action. The notes received were no payment and bar no right."

In *Ray v. Coddington*, 5 John. Chan. 54, Chancellor Kent said, "that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration without notice of the fraud. But he observed that the holders in that case were not entitled to the benefit of the

rule, because it was not negotiated to them in the course of business or trade; nor in payment of any antecedent and existing debt," &c.

This decision was affirmed in the Court of Errors, 20 John. Rep. 637. There was a considerable diversity among the members of the court, some of them holding that a pre-existing debt was not a sufficient consideration to close the equities between the original parties. But since that decision there are many cases in New York, where the Supreme Court has held that an antecedent debt did not constitute a sufficient consideration. 9 Wend. 107. 10 Wend. 85. *The Ontario Bank v. Worthington*, 12 Wend. 593. *Payne v. Cutler*, 13 Wend. 605. And in 16 Pick. 574. 3 Kent's Comm. 80.

The recent cases, however, in New York have shaken, if not overruled, the above decisions. *The Bank of Salina v. Babcock*, 21 Wend. 490. *The Bank of Sandusky v. Scoville*, 24 Wend. Rep. 115.

The Supreme Court of Ohio followed the earlier decisions in New York; as the question, however, is not local but of a general interest, the decision in Ohio, does not constitute the rule for this Court. The construction of a statute by the Supreme Court of a state is followed by this Court, as it constitutes a rule of property and as the rule should be the same in the courts of the United States; and for the same reason on all questions of a general and commercial character, the rule established by the Federal Courts should be followed by the local tribunals.

The case under consideration must be considered as resting upon general principles. And viewing it in this light, it will be found that the decisions in New York and the one in Ohio, are in conflict with those which have been made on the same subject in England, and, also, against the weight of authority in this country.

In *Pillans and Rose v. Van Meirop et al.*, 3 Burr. 1664, the point was decided. Baily on Bills 499, 500, (Lon. ed. 1830.) *Bosanquest v. Dudmon*, 1 Starkie Rep. 1. *Heywood v. Watson*, 4 Bing. 496. *Bramah v. Roberts*, 1 Bing. N. cases 469. Indeed, in the numerous cases which might be cited from the English authorities it has been uniformly held, that a precedent debt is a good consideration. The dictum of Lord Chief Justice Abbott, in *Smith v. Dewitt*, 6 Dowl. & Ryland 120, and, also, in the case of *De la Chaumitte v. The Bank of England*, 9 Barn. & Cres. 209, does not go against the general doctrine. Those cases turned upon different principles, and the remarks of his Lordship seem to have been loosely made or inaccurately reported.

In *Coolidge v. Payson*, 2 Wheat. 66, 70, 73, and *Townsley v. Sumrall*, 2 Peters 170, 182, are in point. And in *Brush v. Scribner*, 11 Conn. 388, an able and most elaborate view of the authorities is taken by the Supreme Court of Connecticut, and in which they come to a conclusion against the New York decisions on this subject:

It seems to be clear that on principle and authority the New York decisions, on this point, are wholly unsustainable. The payment of a debt, it is to be hoped, has not yet become an act "out of the ordinary course of business." And no good reason can be supposed why such debt should not constitute as good a consideration for a note or the assignment of a note, as where money or property is paid at the time.

It is insisted that Johnson fraudulently procured the signature of the defendant and of the others, to the blank notes, and, consequently, that the plaintiffs cannot be considered as bona fide holders of the paper. Here it will be for the jury to decide whether the evidence in the first place establishes a fraud; and in the second, whether the plaintiffs had any knowledge of it. If they participated in the deception alledged to have

been practised, by Johnson, or had notice of it, they cannot recover on the notes.

The fact of the notes having been signed in blank, with the sum marked on each, at the top of the paper, is not a circumstance calculated to put the plaintiffs on inquiry. It was, indeed, an ordinary transaction, in commercial arrangements, and gave authority to the holder of the paper to fill up the notes with the sums designated. It will be, however, for the jury to determine whether the plaintiffs received the note now in question, under such circumstances, as to have put them upon inquiry.

The notes were regularly entered as a credit on the account current against Johnson. From this entry it would seem that the notes were received in payment; and the fact that after Johnson had failed to pay the notes and they were protested, they were charged on the general account, does not rebut this inference. The account was due to the plaintiffs when the notes were executed. This changed the demand from an open account, to promissory notes, and extended the time of payment three and four months.

It is said that a promissory note does not extinguish an open account, unless it is given expressly in payment. But the object of giving a note may as well be ascertained from circumstances as from an express agreement. In the present case the account was over due, by the usual terms of credit given on purchases of merchandize; and the fact that a further credit was given on the execution of the notes, shows that the notes were substituted for the account. And this view is greatly strengthened by the credit given on the general account for the notes. Upon the whole, the Court instructed the jury that if the plaintiffs had no notice of the fraud or deception practised by Johnson, and the notes were received in payment of the

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account, they should find for the plaintiffs. Verdict for the plaintiffs.

NOTE.—The very point ruled in this case has since been decided in *Swift v. Tyson*, 16 Peters 1. The Supreme Court of Ohio have since overruled their first decision.

CIRCUIT COURT OF THE UNITED STATES

OHIO—DECEMBER TERM, 1842.

JONES vs. VANZANDT.

This case was decided at July Term, 1843, but is published as of the above Term.

A demurrer to evidence admits the facts proved, and every legal presumption which may be drawn from them.

A motion to overrule the evidence can only be made on the ground of its irrelevancy or incompetency.

If there be evidence conducing to prove the case made in the declaration the Court will not overrule it.

Slavery exists, only, by virtue of the laws of the States where it is sanctioned.

If a slave abscond from the State where he is held to service, into a jurisdiction where slavery is not tolerated, he is free.

And this would be the law of these States, had not the constitution made a provision that such slave should be delivered up on claim of his master.

There is no general principle in the law of nations which requires such a surrender. It can only be required by virtue of a compact.

Recaption, at common law, could not be made in a foreign sovereignty.

Damages for harboring or concealing a slave, in a free State, are recoverable, only, by virtue of the constitution of the United States and the act of Congress. No suit, therefore, for such an act can be sustained at common law.

Notice that the colored persons harbored or concealed are fugitives from labor need not be in writing by the claimant or his agent, nor need it be given by either of them verbally.

Notice under this act means knowledge.

And if there be evidence, conducing to show such notice or knowledge, it must go to the jury, who will judge of the sufficiency of it.

The same principle applies as to the evidence of harboring or concealing the fugitives.

Jones v. Vanzandt.

Messrs. *Fox, Southgate* and *Morris* appeared for the plaintiff, and Messrs. *Chase, T. Morris* and *Jolliffe* for the defendant.

OPINION OF THE COURT.

THIS action is brought by the plaintiff, a citizen of the State of Kentucky, against the defendant, a citizen of Ohio, under the act of Congress, in regard to fugitives from labor. The declaration contains nine counts:

First: That the plaintiff, being a citizen of Kentucky, where slavery is established by law, owned nine slaves, (naming them) who, without his license, departed from his services, and came to the defendant, &c.

Second: That the said slaves, being fugitives from labor, came to the defendant, &c., who, after notice that they were such fugitives, harbored and concealed them contrary to the statute, &c.

Third and fourth: With some variations the same as above.

Fifth: That the above slaves, &c., that the plaintiff, by his agents then and there undertook to seize and arrest such slaves as fugitives from labor, but was then and there knowingly and wilfully obstructed and hindered, &c., by the defendant from so doing, &c.

Sixth: Charged the defendant with rescuing the fugitives from labor aforesaid, after they had been arrested, &c.

Seventh and Eighth: Were counts in trover.

Ninth: That the defendant harbored and concealed Andrew, a fugitive from labor, after notice, &c.

Jones—A witness called by the plaintiff, stated that the plaintiff owned nine negroes (naming them) and resided in Boone county, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 23d April, 1842, about nine o'clock, he was at the

house of the plaintiff, and saw the negroes; the next day, at about twelve o'clock, he saw the same negroes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed.

The plaintiff paid a reward to the persons who returned the negroes of four hundred and fifty dollars, and other expenses which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum.

Several other witnesses corroborated the statements of this witness, as to the ownership of the negroes, the reward paid, and the value of the services of Andrew.

Hefferman—A witness, stated, that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday morning, a little after day-light, he saw a wagon which was rapidly passing through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates', about six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he checked the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who seizing the reins of the horses drew them up into a corner of a fence. The driver jumped off and ran some dis-

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tance; Vanzant, the defendant, then came out of the wagon and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington and lodged in jail.

Hargrave—Accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice, which directed the colored boy to drive over the witness. That the wagon-tongue being driven against the horse of the witness, he was thrown, and the wagon-horses were driven on the run, until overtaken and stopped. Seeing the defendant in the wagon, with the negroes, the witness asked him if he did not know they were slaves. The defendant replied, that he knew they were slaves, but that they were born free. He said he was going to Springboro, a village in Warren county. This witness, and, also, Hefferman, stated the amount paid, as a reward, for bringing the negroes to Covington, as above.

Hume—Very early on Sunday morning saw the wagon moving very rapidly, and two men on horseback pursuing it, near Bates'. Looked into the wagon, after it was stopped, and saw the defendant in it, with the negroes. He was asked if he did not know that they were slaves, and he replied that, by nature, they were as free as any one. Witness took the negroes to Covington in a wagon. Some time after this he saw the defendant, who said to him, "if you had let me alone, the negroes would have been free, but now they are in bondage." And the defendant said it was a christian act to take slaves and set them at liberty.

Bates, a witness, states that he went to the wagon after it had been stopped, looked into it, and saw the defendant with the negroes. The witness said, "Vanzant, is that you—have you a load of runaways?" The defendant replied, "they are,

by nature, as free as you and I." The witness heard the defendant say that, having been at market in the city of Cincinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and, when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. He afterwards said that he had received the blacks from Mr. Alley.

McDonald, a witness, stated that he heard the defendant say he received the negroes on Walnut Hills, the same place as Lane Seminary. That, at three o'clock on Sunday morning, he found the negroes standing near his wagon, in the road; they got into it, and he started for home. That he rose early, to have the cool of the morning. Defendant said he had done right. That he would, at all times, help his fellow man out of bondage; and that, what he had done, he would do again.

Thurman, a witness, stated that he saw the defendant in the wagon with the negroes, the cover closed behind and before. The defendant said to Hefferman the negroes ought to be free, but he knew they were not. The defendant lives at Sharon, and this was six or seven miles beyond, on the road to Lebanon.

This is the substance of the facts proved, on which the counsel for the plaintiff rested the case. The evidence for the plaintiff being closed, a motion was made by the defendant's counsel to overrule the testimony. This motion was argued on both sides with ability, and at great length.

JUDGE McLEAN, in giving the opinion of the Court on the motion, observed: It is proper, first, to ascertain the precise character of the motion. By some of the counsel, in the argu-

ment, it has been treated as a demurrer to the evidence; but it can not be so considered. No demurrer has been filed, and should the motion be overruled the defendant intends to examine witnesses. A demurrer to the evidence takes the case from the jury; the facts proved are admitted to be true, and, also, every legal inference that can be drawn from them favorable to the plaintiff.

The motion is not, technically, for a nonsuit. Such a motion would not be granted by the Court, where there was evidence conducing to sustain the right of the plaintiff. The motion must then be considered as asking the Court to overrule the evidence, on account of its irrelevancy or incompetency. Now, such a motion is never granted where the evidence is competent, and it conduces to establish the case made in the declaration. The jury are the proper judges of the sufficiency of the testimony.

The range of discussion by the counsel on both sides, has not been restricted by the Court. It has embraced slavery in all its forms and consequences—the federal constitution, the act of Congress, and the power of the States. It may be proper to notice some of the topics thus discussed, which have a bearing upon the case under consideration.

The nature of the action has been examined. It must be admitted that it arises wholly under the constitution and act of Congress. Slavery is local in its character. It depends upon the municipal law of the State where it is established. And if a person held in slavery go beyond the jurisdiction where he is so held, and into another sovereignty where slavery is not tolerated, he becomes free. And this would be the law of these States, had the constitution of the United States adopted no regulation upon the subject.

Recaption has been named as a common law remedy. But this remedy could not be pursued beyond the sovereignty

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where slavery exists, and into another jurisdiction which had entered into no compact to surrender the fugitives. There is no general principle in the law of nations, which would require a surrender in such a case. The remarks of the Supreme Court, in regard to a surrender of captured slaves in the *Amistad* case, were made with reference to our treaty with Spain.

In our colonial governments, and under the confederation, no general provision existed for the surrender of slaves. From our earliest history it appears that slavery existed in all the colonies, and at the adoption of the federal constitution it was tolerated in most of the States.

The constitution treats of slaves as persons. The view of Mr. Madison, who "thought it wrong to admit in the constitution, the idea that there could be property in men," seems to have been carried out in that most important instrument. Whether slaves are referred to in it, as the basis of representation, as migrating, or being imported, or as fugitives from labor, they are spoken of as persons.

Property, real or personal, takes its designation and character from the laws of the States. It was not the object of the federal government to regulate property. A federal government was organized by conferring on it certain delegated powers, and by imposing certain restrictions on the States. Among these restrictions it is provided that no State shall impair the obligation of a contract, nor liberate a person who is held to labor in another State from which he escaped. In this form the constitution protects contracts, and the right of the master, but it originates neither.

The traffic in slaves does not come under the constitutional power of Congress to regulate commerce among the several States. In this view the constitution does not consider slaves as merchandize. This was held in the case of *Graves v. Slaughter*, 15 Peters. The constitution nowhere speaks of

slaves as property. But how does this affect the case under consideration? It is clear the plaintiff has no common law right of action for the injury complained of. He must look exclusively to the constitution and act of Congress for redress. The counsel for the defendant admit that, in a given case, the plaintiff has a remedy under the act of Congress. If this be so, what have we to do with slavery in the abstract? It is admitted, by almost all who have examined the subject, to be founded in wrong, in oppression, in power against right. But in this case we have only to inquire whether the acts of the defendant, as proved under the law of Congress, subject him to a claim for indemnity by the plaintiff.

By the third section of the act respecting fugitives from labor, it is provided. "that when a person, held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said States, the person to whom such labor is due, his agent, or attorney, may seize or arrest any such fugitive," &c. And the 4th section provides "that when any person shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitives from labor, &c., or shall harbor or conceal such persons, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars, &c., saving, moreover, to the person claiming such labor or service, his right of action for, or on account of, the said injuries, or either of them."

As the first clause in the above section supposes the offender to come in contact with the claimant of the fugitives, his agent or attorney, and as there is no evidence showing an authority from the claimant to those who arrested the fugitives, the second clause, only, of the section will be examined. The offence under this clause consists in harboring or concealing such fugitive, after notice that he or she had escaped from

labor. What acts shall constitute this offence? What shall be a notice under the statute? That a formal written notice from the claimant, his agent or attorney, is not required, must be admitted. Nor must the notice, verbal or otherwise, necessarily come from the claimant or his agent. Such a construction presupposes a knowledge, by the complainant, of the individual who harbors or conceals the fugitives. At this stage of the case it is unnecessary to say more on this point than that there is evidence before the jury which conduces to show that the defendant knew the negroes in question were fugitives from labor. Whether the proof is sufficient to establish this fact is a matter for the determination of the jury.

To harbor or conceal a fugitive, in violation of the statute, the act must evince an intention to elude the vigilance of the master or his agents; and the act done must be calculated to attain this object. To relieve the hunger of a fugitive would not be within the statute, unless accompanied by acts showing a determination to disregard the law. There is evidence in the case conducing to show an intention to do this by the defendant, and also to show acts calculated to give effect to such an intention. The sufficiency of this evidence, like that which regards the notice, will be referred to the jury.

The clause in the section, "saving to the claimant the right of action for the injuries received, beyond the penalty, presupposes a right of action to exist." The correctness of this will scarcely be questioned, when the constitutional provision on the subject is considered.

On this motion the question of damages need not be considered, nor the alledged defects in the declaration. These points may be considered in the future progress of the case. The Court overruled the motion.

An unsuccessful effort was made by calling witnesses to impeach the credibility of some of the plaintiff's witnesses.

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The case was argued at great length, and with much ability, before the jury. After the close of the argument,

Judge McLEAN charged the jury as follows:

The attention and patience with which you have heard this case, gentlemen of the jury, show that you appreciate its importance; and I doubt not that, in deciding it, you will follow the dictates of an unbiassed judgment. (Here the Judge restated the evidence, which may be omitted, as it is stated above.)

The plaintiff does not seek redress for the injuries complained of on any general principle, legal or equitable, of the common law. He relies on the Constitution, and the act of Congress, as the foundation of his right.

The 2d section of the IVth. Article of the Constitution, declares that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

And the 3d and 4th sections of the act of Congress, of the 12th February, 1793, as above cited, define more particularly the rights of the master, and provide for him modes of redress.

The seventh and eighth counts, which were in trover, have been abandoned. These counts state that the slaves were casually lost, in Boone county, Kentucky, by the plaintiff, and that they came into the possession of the defendant, a citizen of Ohio. Now, if the slaves left the service of the plaintiff with his consent, or in any other mode, except as fugitives from labor, and came into the possession of the defendant, as alledged, the plaintiff has no right to their services, and still less, to recover from the defendant their value.

The sixth count, which charges the defendant with having rescued the slaves after they were seized by the agents of the

plaintiff, has also been abandoned. There is no evidence which tends, in any degree, to show a rescue.

The fifth count charges the defendant, under the first clause of the 4th section of the act, that he knowingly and willingly obstructed, and hindered the agents of the plaintiff, in seizing or arresting the fugitives. That the defendant resisted, to the utmost of his power, the arrest of the negroes, by Hefferman and Hargrave, is undoubted. But, in this, did the defendant violate the law? The persons who made the seizure had no authority from the plaintiff. And it is the obstruction or hindrance to the arrest, by the claimant, his agent or attorney, that incurs the penalty under the above clause of the statute, and also subjects the party to damages for the injury. The resistance, then, of the defendant to the arrest, by Hefferman and Hargrave was, in no sense, a violation of the statute. They acted without authority, and had no legal right, therefore, to make the arrest.

But it seems, from the evidence, that the plaintiff, when the negroes were returned, ratified the acts of Hefferman and Hargrave, in making the arrest. And here the question arises, whether a subsequent ratification can legalize the arrest. That the subsequent ratification legalizes the original transaction, is a general principle in agencies. And, in this case, it is unquestionably good, as between the plaintiff and his agents. But the inquiry is, whether such subsequent ratification can have relation back, so as to affect the acts of the defendant. Can it so change the nature of the defendant's acts as to subject him to a penalty, which was not incurred prior to such ratification? Most clearly it can not. The statute under consideration is a penal one, and, consequently, must be construed strictly. It is not within the legislative power to make an act penal which was not so when it was done. Much less can such an effect result from the ratification, by the plaintiff, in the present case.

We must look to the other counts in the declaration, which charge the defendant with harboring and concealing the negroes, after he had notice that they were fugitives from labor. If the evidence shall not sustain these counts, the plaintiff can not recover. The plaintiff is bound to show that the defendant harbored or concealed the negroes, after he had notice that they were fugitives from labor.

And, first, as to the fact of notice.

In Kentucky, and every other State where slavery is sanctioned, every colored person is presumed to be a slave. This presumption arises from the nature of their institutions, and from the fact that, with few exceptions, all the colored persons within those States are slaves. On the same principle, every person in Ohio, or any other free State, without regard to color, is presumed to be free. No presumption, therefore, arises, from the color of these fugitives, alone, that the defendant had notice that they were slaves.

A notice in writing to the defendant was not necessary, nor any special notice from the plaintiff, his agent or attorney. But if, at the time the defendant was connected with these negroes, he had a full knowledge of the fact, however acquired, that they were slaves and fugitives from labor. it is enough to charge him with notice. You must satisfy yourselves on this point by an examination of the evidence. The fact must be clearly proved, and, if it be so proved, it would be a reproach to the law, and to the administration of justice, to hold that the notice was insufficient.

What shall constitute a harboring or concealing within the statute? This offence is not committed, in my judgment, by treating the fugitive on the ordinary principles of humanity. You may converse with him, relieve his hunger and thirst, without violating the law. In short, you may do any act which does not show an intent to defeat the claims of the master.

But any overt act which shall be so marked in its character, as not only to show an intention to elude the vigilance of the master, but is calculated to attain such an object, is a harboring of the fugitive in violation of the statute. It is clearly within the mischief it was designed to prevent.

To constitute the offence under the statute, it is not necessary to incarcerate the fugitive in a dungeon or room: if he be taken in a wagon and conveyed from the shore of the Ohio to the shore of Lake Erie which enables him to escape into Canada, I suppose no one could doubt that the individual had made himself responsible. And if carrying the fugitive the whole of this route would incur the penalty, on the same principle the conveyance of him such a part of the route as shall cause the loss of his services to the master would equally incur liability.

The damages claimed by the plaintiff consist of the sum of four hundred and fifty dollars paid as a reward to Hefferman and Hargrave, and other expenses, amounting in the whole to about six hundred dollars. And, also, he claims the value of the services of Andrew, who has been lost to the plaintiff. Those services are estimated by the witnesses to be worth six hundred dollars. It is said that this sum could have been realized by the plaintiff for the boy.

Under the statute you will observe that a penalty of five hundred dollars is incurred for harboring or concealing a fugitive, which the party injured may recover, but the present action is not for this penalty. In this suit the plaintiff is only entitled to recover the damages he has actually sustained by the acts of the defendant. You will first determine whether the proof under the principles here laid down entitle the plaintiff to recover. And if he be so entitled then you will consider the amount of the damages.

It is earnestly contended by the defendant's counsel, that as Hargrave and Hefferman were kidnappers and violators of the

law of the State in arresting the negroes; that they were entitled to no reward, and that the payment of it by the plaintiff does not entitle him to remuneration.

The principle is recognized that the commission of a crime or an agreement to commit an unlawful act, does not constitute a good consideration for a contract. Any contract is void that rests upon such a basis. But this principle does not apply to the point under consideration. It may be admitted that Hefferman and Hargrave were trespassers, if nothing more, in seizing the wagon of the defendant; but the inquiry is, whether, by the laws of Kentucky, the plaintiff was not bound to pay to Hefferman and Hargrave, for the return of the fugitives. There is no doubt of this, as the law of Kentucky is explicit on the subject. If then the plaintiff, by the law of Kentucky, was obliged to pay the sum, and if such obligation resulted from the acts of the defendant, it would seem that the plaintiff may claim indemnity for such an injury. In this incidental mode we cannot try the guilt or innocence of Hargrave and Hefferman. We can only judge of the acts of the defendant, and to what extent he injured the plaintiff.

Unless you should be clearly satisfied, gentlemen, that the defendant, after notice that the negroes were fugitives from labor, did harbor or conceal them within the statute, you will find for the defendant. But if you shall find that the defendant has violated the law, then you will find for the plaintiff the damages he has suffered from such violation of the law and of his rights by the defendant. To authorize such a verdict, you must believe that, by the acts of the defendant, the plaintiff has been compelled to pay the reward stated, and the other expenses, and also that he has lost the services of the colored man, Andrew.

If the evidence showed that the defendant had taken the negroes from the farm of the plaintiff, in Kentucky, and conveyed

them through Ohio until arrested, there would seem to be no doubt of the plaintiff's right to the damages he claims. But there is no proof that the defendant took the negroes from Kentucky. On the contrary it appears, by his own confession, that he received them at the Walnut Hills, near Cincinnati. Still if you shall consider the defendant is liable under the statute, and that the full amount of the injury complained of has been done to the plaintiff by the defendant, it will be your duty to find accordingly.

Gentlemen, in the course of the argument much has been said of slavery in the abstract, of abolitionism, of associations with the view of promoting the abolition of slavery and of acts growing out of these exciting topics, which have no direct connection with the issues before you. Citizens, individually or collectively, have a right to express their opinions and to discuss any subject in which they may feel an interest. Unpopular and foolish as it would be for individuals to form association to alter the constitution of Ohio and annul the ordinance of 1787, so as to admit slavery into the State, yet I suppose no one would question their right to do so. And so long as they should confine themselves to topics of discussion, however erroneous, still they would be obnoxious to no legal penalty. But if they should attempt to subvert the law, by a clandestine introduction of slavery into the State, every good citizen would say they should suffer the penalties for such an offence. I know of no association whose avowed object is to subvert the law, unless it be one in a neighboring State, which I have noticed since the commencement of this trial, and which, it seems, pledges itself to oppose by force the execution of a certain law.

In the course of this discussion much has been said of the laws of nature, of conscience, and the rights of conscience. This monitor, under great excitement, may mislead, and always does mislead, when it urges any one to violate the law.

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Paul acted in all good conscience, when he consented to the death of the first martyr; and, also, when he bore letters to Damascus, authorizing him to bring bound to Jerusalem all who called upon the name of Jesus.

I have read to you the Constitution and the Act of Congress. These bear the impress of the nation. The principles which they lay down and enforce have been sanctioned in the most solemn form known in our government. We are bound to sustain them. They form the only guides in the administration of justice in this case.

I charge you, gentlemen, to guard yourselves against any improper influence. You are to know the parties only as litigants. With their former associations and views, disconnected with this controversy, you have nothing to do. It is your duty to follow the law, to act impartially and justly; and such, I doubt not, will be the result of your deliberations.

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This case was decided July Term, 1843.

Under peculiar circumstances a peremptory challenge, by the State laws, may be allowed to the plaintiff, after he has expressed himself satisfied with the jury, and after two peremptory challenges have been made by the defendant.

Any overt act which intentionally places a fugitive from labor beyond the reach of his master, or is calculated to have such an effect, is a harboring of the fugitive within the statute.

If the defendant had full knowledge from the negroes, or otherwise, that they were fugitives from labor, it is notice under the statute.

If the plaintiff was subjected to the payment of a certain reward, by the laws of Kentucky, for the return of his slaves; and the defendant was the cause of his liability to such payment, the jury may consider it in their estimate of the damages.

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Where the defendant has been the means of the entire loss of a slave, evidence may be received of the value of such slave, by showing what his services were worth, and, as concurring to show that fact, for what sum he might have been sold.

The verdict having been rendered on the third and fourth counts of the declaration by the express direction of the plaintiff's counsel, the other counts can not be referred to as sustaining the verdict.

The above counts charge the loss of the services of the slaves for six days, and the damages to which the plaintiff was subjected.

These damages, from the evidence, could not exceed six hundred dollars. The verdict was for twelve hundred dollars, and is, consequently, excessive.

In what cases a verdict may be amended.

What shall constitute a good finding by the jury, and vice versa.

Under the act of Ohio a count must be abandoned before the jury retire to consult on their verdict.

The remedy pursued by the plaintiff is founded on the act of Congress.

The act gives a remedy to the master for the injury done him, independently of the penalty of five hundred dollars.

An averment that the defendant harbored and concealed the negroes, after notice that they were the slaves of the plaintiff, and were fugitives from labor, is sufficient.

The word "escaped" being used in the statute, is the most appropriate term to be used in the declaration; but any word of equal import will be sufficient.

An averment "that the slaves escaped from the State of Kentucky and came to the defendant, at Hamilton county, in the State and district aforesaid," refers to the State and district last above named, unless the contrary be clearly shown.

A declaration founded upon a statute must conclude against the form of the statute, &c.

The act of Congress on the subject of fugitive slaves is constitutional.

It does not conflict with the ordinance of 1787.

Messrs. *Fox, Southgate* and *Morris* appeared for the plaintiff, and Messrs. *Chase, T. Morris* and *Jolliffe* for the defendant.

OPINION OF THE COURT.

THIS is a motion for a new trial, and, also, in arrest of judgment. The jury found for the plaintiff twelve hundred dollars, in damages, on the third and fourth counts of the declaration.

The first ground on which a new trial is asked, is, "that a peremptory challenge was allowed the plaintiff, after he expressed himself satisfied with the jury, and after two peremptory challenges had been made by the defendant."

The statute gives a right to each party to challenge, peremptorily, two jurors. There was some difference of opinion among the members of the bar as to the State practice on the subject; and the Court thought it not unreasonable to suffer a juror to be challenged by the plaintiff, under the above circumstances. One of his counsel had, inconsiderately, remarked, that they were satisfied with the jury. Both parties were allowed, in this respect, the right given them by the statute, and there was nothing in the mode of exercising that right, which could, in any degree, prejudice the cause of either.

The second ground assumes that "the Court erred in charging the jury that it was not necessary to prove that the defendant, intentionally, placed the colored persons, in question, out of view for the purpose of eluding the search of the master or his agent, in order to establish the fact of concealment, or to prove that he received, sheltered, and placed them out of view for said purpose, in order to establish the fact of harboring, but charged that it was sufficient, if the jury believed from the evidence, that the defendant received the colored persons into his wagon, and transported them to Bates' from Walnut Hills, with intent to facilitate their escape from their master."

The Court gave no such charge as the above, either in terms or in substance. In the published charge, which is substantially correct, the Court say—"any overt act which shall be so marked in its character, as not only to show an intention to elude the vigilance of the master, but is calculated to attain such an object, is a harboring of the fugitive in violation of the statute. It is clearly within the mischief the statute was designed to prevent."

And, again—"to constitute the offence under the statute, it is not necessary to incarcerate the fugitive in a dungeon or room; if he be taken in a wagon and conveyed from the shore of the Ohio to the shore of Lake Erie, which enables him to

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escape into Canada, I suppose no one could doubt that the individual had made himself responsible. And if conveying the fugitive the whole of this route would incur the penalty, on the same principle the conveyance of him such a part of the route as shall cause the loss of his services to the master would equally incur liability."

The counsel who make the motion assume that the Court said, that the transportation of the fugitives by the defendant, in his wagon, from the Walnut Hills to Bates', if done with the intent to facilitate their escape from their master, was sufficient to charge the defendant under the statute.

It will be seen from the printed charge, which, in this respect, is literally correct, that the transportation spoken of, must be such as to cause the loss of the services of the fugitives to the master, or such as is calculated and designed to produce such a result. And this construction of the statute is said to be not as strict, as the nature of the act requires, but a liberal one, such as is given to a remedial statute.

What shall be a harboring or concealing within the statute is necessarily a matter of construction. So diversified is the conduct of men and their devices to evade the law, that no statute could define, with precision, what particular acts shall constitute a harboring or concealing within its spirit. The object of the statute is, to prevent such acts as shall place the fugitive beyond the reach of his master. The word harbor means "to entertain," "to shelter," "to secure," "to secrete," "to receive entertainment," to take shelter." In the sense of the statute it means a fraudulent receiving, securing, hiding, or placing, by transportation or otherwise, a fugitive from labor beyond the reach or knowledge of his master. The act must be fraudulent. That is, it must be done with a fixed intention to violate the law by defeating its object, which is a fraud upon the law as well as upon the rights which the law

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designed to protect. In the language of the charge, "the act must be so marked in its character, as not only to show an intention to elude the vigilance of the master, but such as is calculated to attain that object."

Now, from this definition it would seem that no man, who respects the laws of his country, can be in danger of incurring the penalty of this act. It cuts off from no individual the exercise of humanity. He may indulge, and safely indulge, the better feelings of his nature, in sympathizing with the distressed, and in administering to their comfort. For his acts only is he amenable under the law. His advice to the fugitive does not subject him to any penalty. He may clothe him and give him food. There is only one thing which the law prohibits him from doing, and that is, he shall not harbor or conceal the fugitive so as to defeat the claims of his master. He shall not deliberately and intentionally violate the law of his country. Any thing short of this he may do.

If an individual, under cover of the night, shall possess himself of a dozen or more colored persons, and concealing them in a closely covered carriage, shall, by a rapid movement, drive them from or near the place where such persons were held to service, by the laws of the State, to a place beyond the reach of the master, could any one doubt that such an act would be a violation of the law. The Court and jury must determine what shall amount to a harboring or concealing within the meaning of the statute, the same as what shall constitute treason, murder, burglary, robbery, and every other crime known to the law. The facts are as various as the cases, and in each case the facts must fix the character of the offence.

I was not prepared to hear, in a Court of Justice, the broad ground assumed, as was assumed in this case before the jury, that a man, in the exercise of what he conceives to be a con-

scientious duty, may violate the laws of the land. That no human laws can justly restrain the acts of men, who are impelled by a sense of duty to God and their fellow creature. We are not here to deal with abstractions. We can not theorize upon the principles of our government, or of slavery. The law is our only guide.

If convictions, honest convictions they may be, of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection. The pretext for violating the rights of those who may become obnoxious to censure, can easily be assumed and maintained. And the same plea of the rights of conscience, and the high motive of duty, will be asserted, however absurd, every where, in justification of wrongs. What one man, or association of men, may assume as the basis of action, may be assumed by all others. And in this way society may be resolved into its original elements, and then the governing principal must be force. Every approximation to this state is at war with the social compact. If the law be wrong in principle, or oppressive in its exactions, it should be changed in a constitutional mode. If the organization of our government be essentially wrong, in any of its great principles, change it. Change it in the mode provided. But the law, until changed or abrogated, should be respected and obeyed. Any departure from this inflicts a deep wound on society, and is extremely demoralizing in its effects. No good man, in the exercise of his sober judgment, can either feel or act in violation of this rule.

The third reason for a new trial is, "that the Court erred in charging the jury that it was not necessary, in order to establish the plaintiff's right to recover, to prove actual notice to defendant from the complainant, or some one acting in his behalf, that the persons alledged to be harbored or concealed,

by him, were fugitives from labor within the meaning of the act of Congress, but charged that it was sufficient, if the jury should be satisfied, from the evidence, that the defendant knew that such persons were fugitives from labor, from the admission of the negroes, or otherwise."

The words of the law are—if any person "shall harbor or conceal, (a fugitive from labor) after notice that he or she was a fugitive, shall forfeit, &c." That this notice need not be given in writing is admitted; but it is insisted that it must come to the person who harbors the fugitive from the master, his agent, or attorney.

I lay it down as a general principle, that where the law speaks of notice it is never necessary that such notice should be in writing, unless so required by the statute, commercial usage, or by practice of the Courts.

A notice of taking a deposition the statute requires to be in writing; and a written notice to the indorser of a bill of exchange or promissory note must be in writing by commercial usage; and in many cases written notices are required under rules of courts. But the law of notice is best illustrated, and is most appropriate to the case in hand, which applies to a purchaser of real estate, for a valuable consideration, with notice. Now, if he had notice of a prior title, at the time he purchased, the law holds him to be a fraudulent purchaser. As in the case under consideration, if the defendant harbored the fugitives from labor, claimed by the plaintiff, after notice that they were such fugitives, he committed a fraud on the law.

It is laid down in 1 Gall. 41, as a general rule, "that whatever is sufficient to put the party upon inquiry is good notice." And, also, "where a party has knowledge of the facts he has notice of the legal consequence resulting from those facts."

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An individual who passes a counterfeit coin does not violate the law unless he knew it to be counterfeit. And this guilty knowledge is shown by proving that the same person passed similar coins at other times, or that such coins were found in his possession. Now, if the persons in question were fugitives from labor, and the defendant had full knowledge of the fact, is it important how this knowledge was acquired. Notice is information. Knowledge is equivalent to notice in cases where it is not required to be in writing.

Vanzandt, the defendant, on the trial of certain persons for kidnapping at Lebanon, swore that he received these negroes near the Lane Seminary, at three o'clock on Sabbath morning, he having returned to that place, from the Cincinnati market, on Saturday evening. That they were brought to that place in two carriages, and were delivered to him by Mr. Alley. The cover of the defendant's wagon was closed at both ends of it so as to attract attention. This was done, he stated to some of the witnesses, "to keep out the cold," whilst to others he said, "he started at three o'clock in the morning, that he might have the cool of the morning." This was on the 24th April of last year.

To Thurman the defendant said, "he knew the colored persons in his wagon were not free, but he said they ought to be free." Bates asked the defendant if he had a load of slaves or Kentuckians; he replied, "they are as free by nature as you are." McDonald heard the defendant say that he was not ashamed of what he had done. That he would help his fellow mortals out of bondage. He said the colored persons were free by the constitution. To Hargrave he observed—"if you had not interfered the negroes would then have been free, but now they are slaves, or in bondage."

Now, taking into view the manner in which the slaves were received; the time of night; the rapid manner in which

they were driven, six or seven miles beyond the residence of the defendant; and the attempt to escape from his pursuers by running his horses; the manner in which his wagon was covered, and his own confessions that the fugitives were slaves, no one of sane mind can doubt that he had full notice that the colored persons were fugitives from labor. And that he intended to place them beyond the reach of pursuit seems to be equally clear.

Now, whether the law of Congress be politic or not, is not a question for the Court. They are bound to execute it. To require a notice, verbal or written, to the person who harbors slaves before he is responsible, under the law, from the owner or his agent, would, in effect, strike the law from the statute book. It would be unreasonable and impracticable. It would be against all the analogies of the law.

No one can look at the facts of this case with an honest endeavor to carry out and give effect to the law, who can, it would seem to me, doubt on this subject. No individual is responsible under the law, unless he has a full knowledge that the persons harbored are fugitives from labor, and he so disposes of them, as to place them beyond the reach of their pursuers, or as may be calculated to elude pursuit. The act must be an intentional fraud upon the law, by an utter disregard of its provisions. No law-abiding citizen need fear a liability under this statute.

The third ground of the motion is, "that the Court erred in charging the jury that the plaintiff was entitled to recover from the defendant, by way of damages, the sum of four hundred and fifty dollars, paid as a reward given by a statute of Kentucky to the individuals who forcibly stopped the defendant on the highway in Ohio, seized the colored persons in question and carried them out of the State of Ohio into the State of

Kentucky, without legal process and without any authority or request from the claimant or his agent or attorney."

On this question the Court had nothing to do with the illegal conduct of Hefferman and Hargrave, who took the slaves from the defendant. They were not upon their trial, and we could not inquire whether their acts were legal or otherwise. The only inquiry was, whether, by the acts of the defendant, the plaintiff had been compelled to pay the above sum. The matter of fact was left to the jury, and no doubt can be entertained by the Court that if the payment of the money resulted from the acts of the defendant, the jury very properly included it in their verdict.

This question did not arise under the law of Ohio, but under the law of Kentucky. The plaintiff was subject to the law of Kentucky, and that law imposed the duty on him to pay, as a reward, the above sum to those who should return his slaves, who had escaped from his service.

The plaintiff was only entitled to recover in this case for the injury which had been done him by the defendant. And this injury, so far as this item is concerned, is measured by the law of Kentucky. Now, could any thing be more preposterous than to hold that the plaintiff, if entitled to recover, should not recover the above damage, because, by the laws of Ohio, Hefferman and Hargrave could not have recovered the reward which was unquestionably given to them by the law of Kentucky. In regard to this reward the plaintiff was subject to the law of Kentucky, and not to the law of Ohio. The reward was paid, necessarily and legally paid, under the Kentucky statute. Whether the payment of this reward resulted from the acts of the defendant was a question exclusively for the jury.

The Court, it is alledged, also, "erred in charging the jury that the plaintiff was entitled to recover the market value of Andrew, if they should believe upon the evidence that he es-

caped in consequence of the harboring and concealing by the defendant."

The Court charged the jury that if they believed, from the evidence, that the services of the boy, Andrew, were lost to the plaintiff through the acts of the defendant, that they should give the value of his services. And they called the attention of the jury to one or more witnesses who said the services of the boy were worth six hundred dollars, and that he could have been sold for that sum. It is presumed that a slave is always purchased in reference to his services. His services are bought and sold when the slave is bought and sold. They both, under the laws of Kentucky, mean the same thing. It was, however, to the value of the services of the boy that the attention of the jury was particularly directed. As to the sixth ground no remarks are necessary.

The seventh reason is, that the verdict is against evidence.

And first, it is contended "that there was no evidence that the escape of Andrew was occasioned by the act of the defendant."

This point was fully and fairly left to the jury. It was not a matter for the Court. Andrew was received among the other slaves, by the defendant, according to his own confession, from Alley, at Walnut Hills, at three o'clock, on Sabbath morning; he was transported with the other negroes until the wagon was arrested, when Andrew escaped. He, it seems, drove the wagon at least a part of the route.

Vanzandt swore in the trials at Lebanon, that "he did not know where the negroes were from or where they were desirous of going." But from the circumstance of his receiving them at three o'clock in the morning, from another individual who conveyed them to the Walnut Hills in two carriages, at that unusual hour, the jury may have presumed that the defendant and Alley acted in concert. That there was strong ground for this presumption no one will deny. And if this

concert existed, it would make the defendant responsible for the loss of the services of this boy. In any point in which the question may be considered, the Court cannot say that the verdict, in this respect, was against evidence; or that it was not founded on facts and circumstances which the jury had a right to weigh and determine.

And this answer will equally apply to the alledged want of evidence to show that the expenses of the recapture resulted from the defendant's conduct.

The eighth ground is, "that the damages are excessive."

And first, it is contended "that the liability to pay the rewards of recapture was incurred in consequence of the escape, and did not spring from any act of the defendant." This, in another form, has already been sufficiently considered.

In the second place it is urged "that only the value of the services of the colored people, between their recaption by the defendant and their restoration to their master, should have been taken into consideration by the jury."

The jury had, undoubtedly, a right to take into consideration the value of the services of the boy, Andrew, if, from the evidence, they believed these services had been lost to the plaintiff by the acts of the defendant. And there is no doubt that they did estimate in their verdict the value of those services. But a difficulty arises, in regard to the damages, from the counts on which the verdict was rendered.

The verdict was given on the third and fourth counts of the declaration. These counts go for the loss of the services of the slaves six days, and in the third count is superadded "and the plaintiff was thereby put to great trouble and cost in recovering the slaves." On the seven other counts there was no finding by the jury. The first, sixth, seventh and eighth counts were abandoned on the trial; and the Court instructed the jury there was no evidence under the fifth count. That count

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charged the defendant with obstructing the arrest. And the plaintiff now asks that all the counts except the third and fourth, on which the jury have found, be entered upon the record as having been abandoned. The second, fifth and ninth counts, were not abandoned.

Where a mistake is made in recording the verdict, the Court may amend by the Judge's notes. 2 Strange 1197. 3 Term 749, or, by the notes of the clerk. 1 Salk. 47, 51. So, where part of the plaintiff's claim is good and part bad, and the jury find entire damages, if it appear from the Judge's notes, that damages were given only for the part which was good, the Court will allow the *postea* to be amended. 2 John. cases 17. So, where one count in a declaration is good and the others bad, if the judge certify that the evidence applied solely to that count, &c., the verdict may be amended by applying it to the good count. 1 Caines 381. 11 John. 98.

In *Rockseller v. Donnelly*, 8 Cowen, 652, the Court of Errors held, that the verdict on one out of several issues, if the finding comprise the whole merits, is not error. That a mistake in not entering a verdict on all the issues may be amended, or passed over on error as actually amended. 12 Wend. 215. After a general verdict upon the counts, one good and the other bad, and after a reversal of the judgment for such cause the *postea* will be suffered to be amended so as to have the verdict entered upon the good count only where it appears the evidence applied to both counts.

The rule established in New York is somewhat different from the English rule. In 1 L. Raym. 324, it is laid down that a verdict must comprehend the whole issue or issues submitted to the jury in that particular cause, otherwise the judgment founded upon it may be reversed. In *Sanford v. Porter*, 1 H. Bl. it is said the Court have no authority to amend or alter the

verdict actually found by the jury in point of substance. But a mistake in entering the verdict will be corrected.

In 2 Wheat. 221, it is said, a verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue; this rule results from the nature and the end of pleading, although the Court may give form to a general finding so as to make it harmonize with the issue, yet if the finding is different from the issue or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict.

In Bac. Ab., title, Verdict, letter L, it is said, if part of the issue be insensible, the verdict, notwithstanding it is a general one, is good; but if part of the issue which is sensible be insufficient in law and the verdict be a general one, it is bad. Ib. letter M. If a verdict only find part of the issue and be silent as to the residue, it is bad even for that part which, if it had stood alone, would have been well found; because the jury have failed in their duty, which was to find the whole that is in issue. In *Clark et al. v. Irwin*, 9 Ohio Rep. 132, the Court say the verdict in the case below was a general one of not guilty. The jury did not pass upon the issues joined by two of the defendants. This has heretofore been held a sufficient ground for reversing the judgment. 5 Ohio R. 227.

By the 131st section of the practice act, Swan's-stat. 684, it is provided, "that where there are, in a declaration, several counts, any one or more of which shall be defective and the residue good and entire damages are given, the verdict shall be good and effectual in law, provided the plaintiff, before the jury retire from the bar, apply to the Court to instruct the jury to disregard such defective count or counts." And by the 142d section of the same act, where some counts are defective, and a general verdict, the Court may render judgment on the good

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counts. These statutes are not in force in this Court, as they have never been adopted by Congress or the Court.

The case in 8 Cowen, above cited, is the only one in point, and that considers the finding of the jury for the plaintiff on a part of the counts, is a virtual finding for the defendant on the other counts. But the correctness of this rule is doubted when the counts, like the declaration under consideration, contains distinct grounds of action. In the fifth count the defendant is charged with hindering an arrest of the fugitives, by the agents of the plaintiff. In the ninth count the defendant is charged with having harbored the boy, Andrew, &c., by which his services were entirely lost to the plaintiff. Now can the Court amend the verdict by entering not guilty on these two counts. It is not a formal amendment, though the objection may seem to be technical.

That the jury found the full value for the services of Andrew is clear, and yet such finding, it would seem, can only be sustained under the ninth count. Damages under the third and fourth counts can only be assessed, for the expenses incurred by the plaintiff in the recaption of his slaves, and for the loss of their services, which is stated to have been six days in both the counts. If the Court then shall enter an abandonment of the ninth count, I cannot see how this verdict can be sustained. Though it does not aid the plaintiff as the jury have not passed upon it.

It is said that in an action of tort the Court will seldom, if ever, grant a new trial, on account of excessive damages. But the data on which the damages were estimated in this case were distinct items of expense or loss, estimated by the witnesses in dollars. The jury were instructed, if they found for the plaintiff, that there was nothing in the case which called for exemplary damages. So it would seem whether the counts not embraced by the verdict be abandoned or not, that there

are great difficulties in sustaining the verdict. The damages found are double the sum which in any view the jury could take, under the third and fourth counts, should have been given. Under the ninth count, so far as the verdict is concerned, it might have been sustained.

I will take a very concise view of the reasons in arrest of the judgment.

It is contended that no action is given to the master, by the act of Congress, except that to recover the penalty of five hundred dollars.

The latter part of the 4th section of the act declares, that if any person "shall harbor or conceal a fugitive from labor, after notice that he or she was a fugitive from labor, such person shall, for such offence, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by, and for the benefit of such claimant, by action of debt, in any court proper to try the same, saving, moreover, to the person claiming such labor or service, his right of action for, or on account of the said injuries."

Now it must be admitted that on the principles of the common law, the plaintiff could not sustain this action. It is founded upon the statute, under the constitution. And as it is a statutory remedy, it must clearly exist and be strictly pursued.

The saving of the right of action to the claimant, is in the nature of a proviso, and to understand it every part of the statute which is connected with it must be considered.

The third section provides the mode of recovering a fugitive from labor. The fourth section declares what acts shall constitute offences, for either of which the claimant may recover, as a penalty, five hundred dollars.

It is made an offence to obstruct or hinder the claimant, his agent or attorney, in arresting the fugitives, or to rescue him after the arrest. It also subjects an individual to the penalty,

who shall harbor or conceal the fugitive, after notice that he is a fugitive from labor; saving, moreover, to the complainant a right of action for, or, on account of, the said injuries, or either of them.

The injuries are defined, and the penalty provided; but this penalty, though given to the claimant, is given as a penalty, and not to indemnify him for the injuries received. For these, or any one of them, a right of action is saved. The form of the action was not saved or given, for that existed before, as a means of redress for a wrong done. But it was the ground of action which was saved, notwithstanding the penalty inflicted. The statute, under the Constitution, defined the rights of the master, and provided a mode by which his fugitive slave might be reclaimed. Now, this was a right created by the Constitution and the law. Under the institutions of Ohio, this right has no other foundation than the Constitution and act of Congress. But, under these, it is a right, substantive and important. And, for an obstruction in the exercise of this right, by hindering an arrest of the fugitive, by rescuing him, by harboring or concealing him, whereby an injury is done to the master, his right of action is saved. The acts prohibited are unlawful, because the law punishes them, and saves a right of action to the claimant, for the injury done—the same injury for which the penalty may be exacted. This is the plain meaning of the statute.

The objection that, as no action lay at common law for the injury, and none being expressly given by statute, the action can not be maintained, is wholly unsustainable. The statute creates the right, and declares what shall constitute the wrong; and, for the redress of every wrong, the common law gives a remedy. It was only necessary for the statute to declare, having provided a penalty, that it should not bar a remedy, by action, for the injury done.

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It is alledged, as a reason in arrest of the judgment, "that the third and fourth counts of the declaration, on which the verdict is rendered, are both bad. The third, because it contains no sufficient averment of escape or notice; the fourth, because it contains no sufficient averment of notice, and does not conclude against the form of the statute."

The averments of escape, in both counts, are substantially the same. In the third count, after stating the names of the slaves, and ownership of the plaintiff, and that, under the laws of Kentucky, they were his property, and owed him service, and were held to labor, it is stated that they unlawfully, wrongfully and unjustly, without the license or consent, and against the will of the plaintiff, departed and went away from, and out of, the service of the plaintiff, at Boone county, and the State of Kentucky, and came to Hamilton county, in the State and district aforesaid; yet the said defendant, after notice that the said persons were the slaves of the plaintiff, and fugitives from labor, but contriving, &c., then and there, to wit: at the county and the district aforesaid.

The notice is here sufficiently alledged, and, also, that the colored persons owed service to the plaintiff, under the laws of Kentucky. It need not to have been averred that they were slaves, &c.; but this, being a stronger language than the act requires, does not vitiate the count. There is, however, an important defect in the allegation, of their escape. The word escape is used in the statute, and could, undoubtedly, be most appropriately used in the declaration; but other and equivalent words may answer; and such words, I think, are found in these counts. Without the license or consent, and against the will of the plaintiff, the slaves departed; and, it is averred, that the defendant had notice, before he harbored them, that they were fugitives from labor. But to what place did they escape? The words of the act are—"when a person,

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held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said States," &c. Now, the allegation in this count, is, that the slaves escaped from Boone county, and the State of Kentucky, and came to the defendant, at "Hamilton county, in the State and district aforesaid." What State and district aforesaid? The grammatical reference is to the State and district last above named. The State of Ohio is not named in the count; and the words, "Hamilton county," are not a sufficient designation. The direct reference then, is, to the State of Kentucky, which, by the law, is a district; and, in this view, there is no escape alledged within the statute.

In the second count, which has been abandoned, the slaves are alledged to have departed and went away from the plaintiff, and out of his service, at said Boone county, and came to the defendant, at "Hamilton county, in the State of Ohio, and the district aforesaid." The first count, which has also been abandoned, being founded on the common law for enticing away the slaves, the venue is laid under a *vide licit*, "in the district of Ohio, as aforesaid." There is no district of Ohio alledged, to which this allegation could refer, unless it be in the title of the count, as a caption to the declaration.

This action being founded on the statute, great strictness is required. A good ground of recovery must be shown, if not in the words of the statute, in every material circumstance. And if, in the language of the statute, the slaves did not escape from one State, where they were held to labor, into another State, the action can not be sustained. The title, as set out, would seem to be defective. And this is not cured by a verdict. I entertain great doubts whether the reference to the preceding counts, as regards the escape, can make good the third count. At least, there is great uncertainty in the reference.

A reference to the margin may be sufficient for the venue, but the allegation under consideration is a part of the title. The fourth count, in this respect, is liable to the same exception as the third. But there is another exception taken to the fourth count—"that it does not conclude against the form of the statute."

Mr. Chitty, 1 Pl. 246, says: "If, however, an offence be created by a statute, and a penalty be inflicted, the mere statement of the facts constituting the offence will be insufficient, for there must be an express reference to the statute, as, by the words, 'contrary to the form of the statute,' in order that it may appear that the plaintiff grounds his case upon, and intends to bring it within, the statute." In 405 he further remarks: "It is material, in all cases, that the offence or act charged to have been committed, or omitted by the defendant, appear to have been within the provision of the statute; and all circumstances necessary to support the action must be alledged."

This principle is fully sustained by Mr. Justice Story, in the case of *Smith v. The United States*, 1 Gall. 261; and, also, in *Sears, Jun. v. United States*, 1 Gall. 257. He says "the offence charged in the declaration, is not alledged to be contrary to the form of any statute. The necessity of such averment, in an action founded upon a penal statute, is abundantly supported by authority." 1 Saund. 135, n.

These, it is true, were penal actions; or, actions brought to recover the penalty given in the statute. The same degree of strictness may not be essential, in an action for damages, under a statute. But if the action be founded exclusively upon the statute, and can not be maintained at common law, a reference to the statute, as showing the right of the plaintiff, it seems to me, is essential. The defendant is charged with harboring the slaves of the plaintiff, who had escaped from his service in Kentucky. But the wrong charged is no legal wrong, except

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as it is made so by statute; and the fourth count does not refer to the statute. The statute is a public one, but it is the foundation, and the only foundation, of the plaintiff's right. It may not be necessary to adopt the formal conclusion, as was held necessary in the above cases, where the action was brought for the penalty. But, it seems to me, that the declaration must refer to the statute, as an essential part of the plaintiff's right. I have not had time to look into the authorities extensively on this point; but I think from analogy, and the reason of things, the fourth count is defective in this particular.

The constitutionality of the act of Congress is questioned, on the ground that the sixth article of the compact, in the Ordinance of 1787, for the government of the Northwestern Territory, provides "that any person escaping into the Territory, from labor or service, is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid." This, it is insisted, is paramount to the act of Congress, and imposes no obligation on this State to deliver up a fugitive from labor, except when claimed by a citizen of one of the original States.

The six articles of this Ordinance are declared to be "a compact between the original States, and the people and States in the said Territory, and forever to remain unalterable, unless by common consent." The act of Congress, respecting fugitives from labor, does not conflict with the above provision. It does not purport to repeal the article, nor to modify it. A new and substantive provision is adopted, which carries out the principle of the Ordinance. And it extends the right of claimants to the new States. The Ordinance does not prohibit this. It is, indeed, carrying out its spirit and intention. For it can hardly be supposed that Congress, in adopting the Ordinance, could have intended to secure rights, in regard to claiming fugitives

from labor, to the citizens of the original States, which should not be extended to the citizens of all the States. I deem it unnecessary to consider this subject at large; and I will only say, as there is no repugnancy between the act of Congress and the above article, I do not see how, if the Ordinance retains its full force, the act can be unconstitutional, upon the ground assumed.

As a motion for a new trial was first in order, and as the third and fourth counts, on which the jury found their verdict, claim only compensation for the loss of the services of the slaves for six days, and an indemnity for the expenses to which the plaintiff had been subjected by the acts of the defendant, which do not, from the evidence, exceed six hundred dollars, and, as the verdict rendered was for twelve hundred dollars, I feel bound to set aside the verdict.

In the ninth count, the plaintiff claims for the entire loss of the services of Andrew; but as the jury did not find under this count, and it has been abandoned, it must be considered, for the purposes of this motion, as stricken from the record.

A new trial is granted at the costs of the defendant.

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ABATEMENT.

A suit having been commenced in this Court, is not abated, by an attachment subsequently issued in the State Court. *Campbell v. Emerson*, 30.

ACTION.

On a bond payable by instalments, debt can not be sustained until they shall all become due. *Fontaine v. Aresta*, 127.

But, if the payment be secured by a penalty, debt may be brought. *Ib.*

Where there is no penalty, covenant is the proper action for the instalments on a bond, or, assumpsit, if the instalments be due by a simple contract. *Ib.*

Where a note is given to A, B, C, D, E, F or G, either of the promisees may sue in his own name. *Spaulding v. Evans*, 139.

The promise to pay, is, to either of the promisees. *Ib.*

The acceptance of a bill is evidence that so much money was due by the acceptor, to the drawer, under the money counts. *Benjamin v. Tillman*, 213.

If the plaintiff fail to prove the special contract, he may recover on the general counts. *Ames v. Le Rue*, 216.

AFFIDAVIT.

A plea of the general issue to an action founded upon a written instrument, by the rule of Court, must be sworn to. *Thomas v. Clark*, 194.

AGENT.

An agent may withhold the delivery of an article purchased by him on credit, until he shall be paid for the same. *Matthews v. Menedger*, 145.

A factor has a lien for all advances on account of his principal, for balances due, or liabilities incurred. *Ib.*

But this lien is special, and connected with the possession of the property. *Ib.*

If the property be delivered up, the lien is gone. *Ib.*

But if the factor still controls the property, the lien is not relinquished. *Ib.*

An agency, as against an individual, may be proved by his acts and declarations. *Piatt v. Oliver et al.*, 267.

A declaration in debt on simple contract, is bad, if it alledge the defendant promised to pay. *Metcalf v. Robinson*, 363.

The word agreed, instead of promised, should be used. *Ib.*

Though the declaration, in other respects, have the form of debt, yet, if it alledge a promise, it has the form of assumpsit, and not of debt. *Ib.*

APPEAL.

An appeal from the District to the Circuit Court, must be taken to the next Circuit Court. *United States v. Haynes*, 155.

Appeals, as above, are only allowed in cases of admiralty and maritime jurisdiction. *Ib.*

All other cases must be removed by writ of error. *Ib.*

APPLICATION OF PAYMENTS.

The general doctrine as to the application of payments, is, that if the debtor fail to apply them, the Government may do so. If both fail, the law will make the application, as the principle of justice shall require. *United States v. Linn*, 501.

Where different sets of sureties are concerned, this rule does not govern. *Ib.*

Sureties are only bound, on a Receiver's of Public Moneys' bond, that he shall pay over all moneys on hand, at the date of the bond, and which he shall subsequently receive. *Ib.*

ARREST OF JUDGMENT.

An averment that the defendant harbored and concealed fugitives from labor, after notice that they were such fugitives, is sufficient.

Jones v. Vanzandt, 612.

The word escaped being used in the act of Congress, is the most appropriate term to be used in the declaration; but any word of equal import will be sufficient. *Ib.*

An averment that the slaves "escaped from the State of Kentucky, and came to the defendant, at Hamilton county, in the county and District aforesaid," refers to the State and District last above named, unless the contrary be clearly shown. *Ib.*

A declaration founded upon a statute, must conclude against the form of the statute. *Ib.*

ASSIGNMENT.

A note executed in Michigan, payable in New York, in New York funds, or their equivalent, is not negotiable. *Hasbrook et al. v. Palmer et al.*, 11.

To bring a note within the statute, it must be payable in money. *Ib.*

It must be for a sum certain, subject to no conditions. *Ib.*

If the maker of a note prove fraud, the assignee is bound to show a valuable consideration. *McClintick v. Cummins*, 98.

A note payable to A. B. or bearer, passes by delivery, and the holder may sue. *Bradford v. Jenks et al.*, 130.

On a lost note, which was assigned, suit must be brought by the assignee. *Leavitt v. Cowles*, 491.

The promisee being in possession of the note, and having assigned it merely for the purpose of collection, may strike out the assignment, and sue in his own name. *Ib.*

The legal right is vested in the assignee, and can only be divested by striking out the assignment as above, or by reassignment. *Ib.*

A mortgage assigned in payment of a debt is not held by the assignee subject to the claims of the creditors of the assignor. *Hubbard v. Turner*, 519.

Although there may be an equitable lien on the mortgaged premises, yet the assignee, having no notice of it, is not affected by it. *Ib.*

ASSIGNMENT—Continued.

If the mortgagor have a setoff, or mutual credit, against the mortgagee, it is not affected by the assignment. *Ib.*

A payment made to the mortgagee, after the assignment, but before the mortgagor has notice of it, is good against the assignee. *Ib.*

The Statute of Illinois, however, places bonds and mortgages on the same footing with bills of exchange. *Ib.*

A precedent debt constitutes a good consideration for the assignment of a note. *Riley v. Van Amringe*, 589.

Although there may have been fraud in the assignment, yet if there were no notice of it, it can not be set up against a bona fide assignee. *Ib.*

A note assigned in payment of a debt is a transaction in the ordinary course of business. *Ib.*

ASSIGNOR.

In an action against the assignor by an assignee, it is not necessary to prove the note. *Kendall v. Freeman*, 189.

ASSUMPSIT.

Plaintiff may recover on a promise to pay where the special contract is barred by the statute. *Ames v. Le Rue*, 216.

It has been held that a note payable in specific articles is evidence under the general counts. *Ib.*

Between the holder and the other parties to the bill there is a privity on which indebitatus assumpsit may be brought. *Frazer v. Carpenter*, 235.

The action of assumpsit is founded on the promise—the action of debt upon the contract. *Metcalf v. Robinson*, 363.

ATTACHMENT.

A resulting trust is not liable to be attached. *Piatt v. Oliver and Williams*, 267.

A purchaser, at the sale of the above right, under an attachment, acquires no right. *Ib.*

An attachment reaches only legal rights. *Ib.*

ATTORNEY.

An attorney who may be chargeable with negligence is liable, only, to the extent of the injury his client has received. *Suydam & Co. v. Vance*, 99.

AVERMENT.

An averment in the declaration that A B, by C D, made a certain bill or check, is sufficient. *Sherman v. Comstock*, 19.

An averment of notice, where notice is required, essential. *Ib.*

Where a note was given by Abbott and Layton, it is unnecessary to aver a partnership in the declaration. *Davis v. Abbott*, 29.

The note shows a joint liability. *Ib.*

A general averment of the citizenship of the plaintiff is sufficient. *Thompson v. Cook*, 122.

Where a note is payable at a particular place, no averment of presentation at such place, when due, is necessary, 122.

In an action on a marshal's bond it is not necessary to aver that the penalty has not been paid. *Sperring v. Taylor*, 362.

The usual averment of the breach of the condition is sufficient. *Ib.*

The defendant guarantied that certain certificates of stock should pay 10 per cent. per annum—held that an averment that no dividend was made was insufficient. *Hank v. Crittenden*, 557.

The undertaking was collateral, and in all such cases a demand and notice must be averred. *Ib.*

BILL OF EXCHANGE.

See PROMISSORY NOTE.

In a bill of exchange, or other negotiable instrument, the words, "value received," are not necessary. *Benjamin v. Tillman*, 213.

A letter written a reasonable time before or after the date of a bill of exchange, describing it, and promising to accept it, is a virtual acceptance. *Bayard v. Lathy*, 462.

An authority to draw several bills of exchange, payable at specified periods, with an assurance that the bills should be paid, is an acceptance to the person who takes the bill on the credit of such an authority. *Ib.*

BILL IN CHANCERY.

See **CHANCERY**.

BOUNDARIES.

Evidence of identity, which describes the land so as to distinguish it from other tracts, sufficient for a deed, and, also, in an action of ejectment. *Godfrey v. Beardsley*, 412.

CHANCERY.

If A have a lien on two funds, and B on one of the funds, equity will require the fund which is not common to both to be exhausted before the common fund is applied. *Findlay's Executors v. United States Bank*, 44.

In some cases, independently of any statutory provision, the surety, in equity, may compel the holder of a note, &c., to proceed against the principal. *Fuller v. Milford*, 74.

An equitable right is not liable, at common law, to be sold on execution or attachment, but should be sold under a decree. *Piatt v. Oliver*, 267.

A specific execution will not be decreed at the instance of the vendor, where he has been guilty of gross negligence, or the property, since the time fixed for the performance, has greatly deteriorated in value. *Cooper v. Brown*, 495.

The consideration having been paid, if the vendor refuse to convey the vendee may disaffirm the contract, and bring his action for the money paid. *Ib.*

The vendor is bound to make and tender the deed. *Ib.*

The bringing of the action for the purchase money, paid by the vendee, is a disaffirmance of the contract. *Ib.*

Fraud is a ground for the exercise of an equitable jurisdiction. *Hubbard v. Turner*, 519.

It is not the English practice to set up a matter in the answer, which shall have the effect of a crossbill. *Ib.*

In those States where there is no Court of Chancery the chancery powers of the Circuit Court may be exercised. *Lorman v. Clark*, 569.

Chancery. Clerk of the Court. Common Law. Consideration.

CHANCERY—*Continued.*

A creditor's bill being authorized by the laws of a State, may be filed in the Courts of the United States. *Ib.*

The law may be considered as creating a new right which can only be enforced in chancery. *Ib.*

CLERK OF THE COURT.

A clerk is bound by the acts of his deputy, but where the act is not in the ordinary course of business, and, especially, where it has been done through the procurement and misrepresentations of a party, the liability of the clerk may be doubtful. *Welldes v. Edsell*, 366.

Under such circumstances the Court will not give, against the clerk, a summary mode of redress. *Ib.*

COMMON LAW.

There is no principle of the common law which pervades the Union, and exists independently of the laws of the States. *Lorman v. Clarke*, 568.

This rule is found, as adopted and modified by the laws and judicial decisions of the respective States. *Ib.*

CONSIDERATION.

Where the action is on a promissory note, a failure of consideration is a good defence. *Scudder v. Andrews*, 464.

A partial failure can not be set up. *Ib.*

Where the defendants gave their note for a tract of land, which belonged to the United States, and to which the plaintiff had no title, the defendants may plead the fact. *Ib.*

The consideration acknowledged to have been received on the face of a deed of conveyance, does not estop the grantor from showing, in an action for the purchase money, that the consideration money has not been paid. *Taggart v. Stanbery*, 543.

So far as regards the effect of the deed, the consideration named can not be controverted. *Ib.*

A compromise of an outstanding claim, without the consent or knowledge of the grantor, can give no claim to an offset, in an action for the consideration money. *Ib.*

CONSIDERATION—Continued.

The liability of the grantor must depend upon the validity of the claim purchased in, and not upon the sum paid for it. *Ib.*

A precedent debt constitutes a good consideration, on the assignment of a note. *Riley v. Anderson*, 589.

CONSTITUTIONAL LAW.

The Constitution of Michigan does not restrict the Legislature from creating more than one corporation in the same act. *Falconer v. Campbell*, 195.

Every act of incorporation requires the sanction of two thirds of each House. *Ib.*

The act, having the usual solemnities, must be received as law. *Ib.*

The number of Bank corporations is a question of policy, and not of principle. *Ib.*

The act of 15th March, 1837, is constitutional. *Ib.*

The effect of a State judgment in every other State, is a question under the Constitution and act of Congress; consequently, the decision of the Supreme Court is paramount. *Westerwelt v. Lewis*, 511.

CONTRACT.

A contract made in fraud of the law, which grows out of an immoral act, will not be enforced. *Piatt v. Oliver et al.*, 267.

An agreement not to bid against each other at a sale on execution, is void, as against public policy. *Ib.*

But an association of individuals, to buy public lands at a public sale, is not unlawful. *Ib.*

It may well be doubted whether such sale stands upon the same footing as a sale on execution. *Ib.*

The agreement was, to purchase certain tracts for a certain company—not that the individuals, composing the firm, should not bid against each other. *Ib.*

An agent, and one of the parties, should not avail himself of the illegal contract. *Ib.*

The public sale was sanctioned by the Government. *Ib.*

COPY.

The defendant served a notice on the plaintiff's attorney to furnish him with copies of all deeds, records of judgments, decrees in chancery, and all other evidence which he intended to use on the trial. Order refused. *Copperthwait v. McCord*, 143.

CORPORATION.

Constitution of Michigan does not prohibit the Legislature from creating more than one bank corporation in the same act. *Falconer v. Campbell*, 195.

The number of banks, under the constitution, is a question of policy and not of principle. *Ib.*

To create, in the same act, more than one corporation is common. *Ib.*

Under the act of 15th of March, 1837, the directors and stockholders are a corporation, and not merely a joint stock association. *Ib.*

CRIME.

Accepting a commission from any district of people or association of people, to carry on war against any people or State with whom we are at peace, is an offence. 2.

The commission must have been accepted and exercised within the jurisdiction where prosecuted. *Ib.*

To begin to set on foot is also an offence. *Ib.*

To contribute money, clothing for the troops, provisions, arms, &c., is a violation of the law. 3.

The criminal intent must be shown. *Ib.*

The acts must have been done, to constitute the offence, within the district where indictment shall be found. 4.

Respect for the laws essential to the maintenance of our government. *Ib.*

The 25th section of the postoffice law which prescribes a penalty for the detention of a letter, refers to a letter or packet detained before it reaches its destination. *United States v. Pearce*. 14.

The stealing or taking a letter in the 22d section means a clandestine taking. *Ib.*

CUSTOMS.

It is the duty of an officer of the customs, on making a seizure of goods, for having been imported in violation of the revenue laws, to institute proceedings in rem in the District Court. *Hall v. Warren et al.*, 332.

The District Court has exclusive jurisdiction of forfeitures. *Ib.*

Whether the seizure has been rightful or tortious cannot be ascertained until the matter has been adjudged by the Court. *Ib.*

If the person making the seizure refuse to proceed in the District Court, on application to that court by the owner, he will be compelled to do so or return the goods. *Ib.*

Should the goods be adjudged to be returned by the court, and a certificate of reasonable cause refused, it is final. *Ib.*

There can be no justification of the act of seizure, except on a judgment of condemnation, or a certificate of reasonable cause. *Ib.*

The officer making the seizure should examine the goods before it is made, and not make it unless there be reasonable cause. *Ib.*

Where goods are taken from the possession of the owner, and detained, without reasonable cause, the officer is liable to damages to the full extent of the injury. *Ib.*

DEBT.

The action of debt is founded upon contract—the action of assumpsit upon the promise. *Metcalf v. Robinson*, 368.

In the one case the declaration should aver the defendant agreed—in the other that he promised. *Ib.*

DECLARATION.

An averment in the declaration that A B, by C D, made a certain bill, is sufficient. *Sherman v. Comstock*, 19.

A declaration is defective if it does not aver notice, when founded on a check, &c. *Ib.*

As a notice is necessary to give a right of action against the guarantor, the declaration must aver that it was given. *Ib.*

An averment that notice was given to the guarantor more than seven months after note became due, insufficient. *Ib.*

Declaration.

DECLARATION—Continued.

Where there is an excuse for not giving notice, it should be stated in the declaration *Ib.*

Where a note was given by Abbott & Layton, it is unnecessary, in the declaration, to aver a partnership. *Davis v. Abbott*, 29.

The instrument shows a joint liability. *Ib.*

A declaration must contain a statement of facts, which, in law, gives the plaintiff a right to recover. *Stanley v. Whipple*, 35.

This is the question to be answered on a demurrer. *Ib.*

After verdict, defects in substance are cured, if, from the issue in the case, the facts omitted must have been proved. *Ib.*

Where contract has been performed, recovery on general counts. *Ib.*

A note dated at Cincinnati, and described in the declaration, as dated at Cincinnati, in the state of Ohio, is admissible in evidence. *Drake v. Fisher*, 69.

The contract being transitory, the words, "in the state of Ohio," may be rejected as surplusage. *Ib.*

It is sufficient to describe the note in terms or according to its legal effect. *Ib.*

Whatever is necessary to give a right of action to the plaintiff must be averred. *Walker v. Johnson's Administrators*, 92.

Where a note has been assigned by a firm it is unnecessary for the assignee to aver and prove the names of the firm. *Thompson v. Cook*, 122.

This is the rule at common law. *Ib.*

Where a note is payable at a particular place, the declaration need not aver that the note, when due, was presented at such place for payment. *Thompson v. Cook*, 122.

The assignee who sues in his own name must show that his assignor might have sued also in the federal court. *Rogers v. Linn*, 126.

Where a note is given to A, B, C, D, E, F, or G, the suit may be brought in the name of either of the promisees. *Spaulding v. Evans*, 139.

In such a case it is not necessary to set out the note in terms in the declaration, but according to its legal effect. *Ib.*

On a joint note suit must be brought against all, unless one or more of the promissors have been discharged by infancy or operation of law. *Woodworth v. Shafford*, 168.

Declaration.

DECLARATION—*Continued.*

In an action of assignee against his immediate indorsers, if the declaration aver that it was indorsed by the defendants by the name of A. B., it is sufficient. *Kendall v. Freeman*, 189.

Where the contract shows a joint liability it is unnecessary to aver and prove a partnership. *Ib.*

The existence of the bank, though stated in the declaration by way of recital, is sufficient. *Falconer v. Campbell*, 195.

If facts are stated in the declaration which show that defendants become a body corporate, sufficient. *Ib.*

The fact of incorporation is an inference of law. *Ib.*

The objection that the law was not passed by the constitutional majority must be raised by plea. *Ib.*

The declaration must show a perfect right. *Ib.*

If the declaration is founded on an amendatory act which refers to and continues a former one, it should conclude against the statute and not statutes. *Ib.*

A declaration which charged a receiver of public moneys with not paying moneys which came into his hands the day after his bond expired, is bad on demurrer. *United States v. Spencer*, 265.

In an action against the marshal, where the defendant had a right to replevy, it is too general to aver that the marshal did not make the money. *Bispham v. Taylor*, 355.

The marshal is bound to make the money if the judgment be not replevied. *Ib.*

An averment in a declaration that the marshal took insolvent sureties and not freeholders, is sufficient. *Bispham v. Taylor*, 355.

In a declaration on a marshal's bond it is not necessary to aver that the penalty has not been paid. *Sperring v. Taylor*, 362.

The usual averment of the breach of the condition is sufficient. *Ib.*

By the statute of Indiana the representatives of a deceased joint obligor may be sued, as on a joint and several obligation. *Curtis v. Bowrie*, 374.

A declaration which alleges a promise by the deceased to pay, and also a promise by his administrators, though informal, is not bad on general demurrer. *Ib.*

If it appear the defendants are charged in the declaration in their

Declaration. Damages. Deposition. Equity. Evidence.

DECLARATION—*Continued.*

representative character and not in their own right, it is sufficient. *Ib.*

The difference between a note payable on a particular day and on or before such day is material, when described according to its legal effect. *Kikindal v. Mitchell*, 402.

The citizenship of the party which gives jurisdiction must be specially averred. *Leavitt v. Cowles*, 491.

An averment that the plaintiffs are citizens of New York, to wit, of Illinois, where the suit is brought, is a repugnant averment. *Ib.*

A venue laid in the body of the declaration is sufficient. *Dwight v. Wing*, 580.

By the English rule the venue is laid in the margin. *Ib.*

A general averment of notice is sufficient to charge an indorser of a note. Under it facts may be proved. *Ib.*

DAMAGES.

A jury, in the exercise of their discretion, may give interest on the value of property converted as a part of the damages. *Matthews v. Menedger*, 145.

DEPOSITION.

The courts of the United States are presumed to know the laws of the respective states. *Jasper v. Porter* 570.

The court are presumed to know who can take depositions, under the laws of the state, and the official character of such persons will be presumed without further proof than their having acted as such. *Ib.*

EQUITY.

See CHANCERY.

EVIDENCE.

The books of the party are not evidence unless made so by a call to produce them. *Stanley v. Whipple*, 35.

Where the evidence conflicts a verdict will not be set aside. *Ib.*

Parol evidence not admissible to vary a written agreement. *Findlay's Executors v. United States Bank*, 44.

EVIDENCE—Continued.

By the English rule the admissions of a late partner are evidence to charge the firm. *Biopham v. Patterson et al.*, 87.

A different rule has been established in New York. *Ib.*

The Supreme Court of the United States seem inclined to the New York rule, and under their authority this Court exclude the confessions of a partner after the expiration of the partnership. *Ib.*

If the maker of a note prove fraud, the assignee is bound to show a valuable consideration. *McClintock v. Cummins*, 98.

Parol proof of the contents of a written agreement cannot be given, if it be in the hands of the opposite party, unless notice has been given to produce it. *United States v. Winchester*, 135.

The rule of evidence is the same in criminal as in civil cases. *Ib.*

The record of a judgment for the same cause can only be received in evidence to bar the plaintiff's action, or to show that certain proceedings under it have operated to change the right of property. *Hopkins v. Menedger*, 145.

A contract between certain passengers and the agent of a stage line, cannot be proved by an individual not a party to the contract. *Maury v. Talmadge*, 157.

A general custom, as to the number of passengers conveyed, may be proved, but not the practice established on the route. *Ib.*

The declarations of a driver, not in general, evidence. *Ib.*

The jury, in a patent right case, will determine from the models and other evidence whether there is a difference in principle between the two machines. *Smith v. Pearce*, 176.

In an action by the assignee against the assignor of a note, it is not necessary to prove the execution of it. *Kendall v. Freeman*, 189.

The indorsement must be proved. *Ib.*

The acceptance of a bill is evidence against the acceptor, in behalf of the drawer of so much money, under the money counts. *Benjamin v. Tillman*, 43.

If the plaintiff fail to prove the special contract he may recover on the general counts. *Ames v. Le Rue*, 266.

In such case the facts of the special contract may be shown to show the amount due. *Ib.*

EVIDENCE—Continued.

Possession of a note, payable to bearer, is prima facie evidence of right. *Ib.*

In an action between the holder of a bill of exchange and the acceptor, the bill is evidence under the general money counts. *Frazer v. Carpenter*, 235.

So it is evidence between the holder and a remote indorser. *Ib.*

The lapse of twenty years creates a presumption that a bond has been paid. *Denniston v. McKeen*, 253.

This may be rebutted by circumstances. *Ib.*

Circumstantial evidence is sufficient to convict, but it should be received with caution. *United States v. Martin*, 256.

An individual who holds himself out to the world as a partner is liable as such, though he have no interest in the firm. *Benedict et al. v. Davis' Administrators*, 347.

But this holding out must have been such as to justify the inference that the creditor had knowledge of it. *Ib.*

A declaration by an individual that he was a partner to some four or five individuals, of which the creditors had no knowledge, when he trusted the firm, incurs no liability. *Ib.*

To rebut such declarations the contract made between the parties, though by parol, may be proved. *Ib.*

On an indictment against a postmaster for secreting or embezzling a letter, it is enough to show that it came into the hands of the postmaster, in the words of the statute, without showing where it was mailed, and on what route it was conveyed. *United States v. Lancaster*, 43.

An accomplice is a witness, but his statements should always be received with great caution. *Ib.*

Books of accounts are not evidence at common law. *Gale v. Norris*, 469.

But entries made by a clerk, who is deceased, are evidence. *Ib.*

The original book, however, must be produced. *Ib.*

To make the entries evidence they must have been regularly entered, and the books, upon their face, must have the appearance of fairness. *Ib.*

Evidence.

EVIDENCE—Continued.

By the statute of Illinois property levied on by execution, claimed by an individual, the sheriff, on being notified, is bound to summon a jury who shall inquire into the right of property and return under their hands, &c. Parol proof of such a proceeding is not admissible. *Lawrence v. Sherman*, 488.

The writing must be produced, or it must be proved to have been lost or destroyed. *Ib.*

It may be doubted whether parol evidence is admissible to show that a defendant is surety against the terms of the note. *Dibble v. Duncan*, 553.

But, if the intent with which the indorsement was made be doubtful, it may be explained by parol. *Ib.*

A transcript from the postoffice department, to show the indebtedment of a postmaster, need not contain a full copy of his quarterly return. *Lawrence v. The United States*, 581.

In such cases the balance is returned by the postmaster. *Ib.*

Where the surety is charged with receipts, for postage, for a part of the quarter, the return for the full quarter is evidence to show an average liability for a part of it. *Ib.*

A demurrer to evidence admits the facts proved, and every legal presumption which may be drawn from them. *Jones v. Vanzandt*, 596.

A motion to overrule the evidence can only be made on the ground of its irrelevancy or incompetency. *Ib.*

If there be evidence conducing to prove the case made in the declaration the Court will not overrule it. *Ib.*

Where a receipt for the payment of a judgment has been improperly obtained by a defendant without the payment of the amount, from the deputy clerk, the Court will not set aside an execution issued on the judgment. *Welldes v. Edsell*, 366.

An equity of redemption, at common law, cannot be sold on execution. *Hill v. Smith*, 446.

When a mortgagee brings an action on mortgage bond, obtains judgment, sells the right of redemption, and becomes the purchaser on the supposition that such an interest can be sold, the equity purchased at the sale merges in the legal estate. *Ib.*

Evidence. Executors and Administrators. Federal Government. Fraud. Freight.

EVIDENCE.

A sale on execution by the late marshal, though the levy was made by him while in office, is irregular. *Overton and King v. Gorham et al.*, 509.

The sale set aside and a venditioni exponas issued to the present marshal. *Ib.*

EXECUTORS AND ADMINISTRATORS.

Where, under the statute of Indiana, an estate is insolvent, the executor or administrator may institute proceeding before the court of probate to which creditors are bound to answer, and the executor or administrator is not liable unless he be guilty of fraud, negligence or waste, such allegation must be contained in the declaration. *Walker v. Johnson's Administrator*, 92.

FEDERAL GOVERNMENT.

The federal government has no criminal jurisdiction except what is given by statute. *United States v. Lancaster*, 431.

FERRY RIGHTS.

See RIPARIAN RIGHTS.

FRAUD.

Fraud must be clearly proved. *Hubbard v. Turner*, 519.

A mortgage on a large amount of property for the payment of ninety thousand dollars, where but four thousand dollars were due to the mortgagees, is fraudulent as against creditors. *Hubbard v. Turner*, 519.

Although there may have been fraud or deception in obtaining the note, yet if the holder had no notice of it the equities between the original parties are not open. *Riley v. Van Amringe*, 589.

FREIGHT.

Where a vessel is unable to reach the destined port and the owner of the cargo receives it, at an intermediate port, freight pro rata itineris may be recovered. *Bork v. Norton*, 422.

FREIGHT—Continued.

The master, who is driven into an intermediate port by stress of weather, and his vessel is unable to proceed, is bound to repair his vessel, in convenient time, or procure another vessel to convey the goods. *Ib.*

And if he fail in this he is not entitled to freight. *Ib.*

Where the owner of the cargo is the cause why it is not transported to the port designated, full freight may be demanded. *Ib.*

A permanent embargo excuses the master from the performance of his contract. *Ib.*

If the obstruction be temporary it suspends it. *Ib.*

A contract for the transportation of goods on the lakes may not, in every respect, be subject to the maritime rule which applies to the high seas. *Ib.*

If there be an obstruction on the lake, a land conveyance may be resorted to. *Ib.*

FUGITIVES FROM LABOR.

There is no general principle in the law of nations which requires a surrender of a fugitive slave. *Jones v. Vanzandt*, 596.

The surrender must be required by compact. *Ib.*

Recaption, at common law, could not be made in a foreign sovereignty. *Ib.*

Damages for harboring or concealing a slave, in a free state, are recoverable only by virtue of the constitution and act of congress. *Ib.*

Notice that the colored persons harbored or concealed are fugitives from labor need not be in writing by the claimant or his agent, nor need it be given by either of them verbally. *Ib.*

Notice under the act of congress means knowledge. *Ib.*

If there be evidence conducing to show such notice or knowledge, it must go to the jury who will judge of the sufficiency of it. *Ib.*

The same principle applies to the evidence of harboring or concealing the fugitives. *Ib.*

Any overt act which intentionally places a fugitive from labor beyond the reach of his master, or is calculated to have such an effect, is a harboring of the fugitive within the statute. *Jones v. Vanzandt*, 611.

FUGITIVES FROM LABOR—Continued.

If the defendant had full knowledge, from the negroes or otherwise, that they were fugitives from labor it is notice under the statute. *Ib.*

If the plaintiff was subjected to the payment of a certain reward, by the laws of Kentucky, for the return of his slaves; and the defendant was the cause of his liability to such payment, it may constitute a part of the damages. *Ib.*

Where the defendant has been the means of the entire loss of a slave, evidence may be received of the value of such slave, by showing what his services were worth, and as conducing to show that fact for what sum he might have been sold. *Ib.*

The act of congress on the subject of fugitive slaves is constitutional. *Jones v. Vanzandt*, 612.

It does not conflict with the ordinance of 1787. *Ib.*

GUARANTOR.

A guarantor is entitled to a notice of the nonpayment of the bill guaranteed. *Lewis v. Brewster*, 21.

A notice after the lapse of seven months insufficient. *Ib.*

If the payee be insolvent when note becomes due no notice necessary. *Ib.*

An indorser, who, by his indorsment, increases his liability, is to be considered a guarantor. *How & Co. v. Kimball*, 103.

The new contract can only be enforced between the parties to it. *Ib.* It does not pass to any subsequent assignee. *Ib.*

To charge the guarantor of a note or bill he must have notice of demand and nonpayment. *Foot & Bowler v. Brown*, 369.

And this whether the name of the guarantor be upon the bill or not. *Ib.*

Where the name is on the bill strict notice is required, but where it is not, reasonable notice is sufficient. *Ib.*

A total insolvency of the principal supersedes the necessity of a demand on him and notice to the guarantor. *Hank v. Crittenden*, 557.

Imprisonment for Debt. Indictment. Indorser and Indorsee.

IMPRISONMENT FOR DEBT.

The act of Ohio abolishing imprisonment for debt, except in certain cases, having been adopted by congress, can only affect proceedings in a case subsequently to its adoption. *Wilber v. Ingersoll*, 322.

INDICTMENT.

A prosecuting attorney, with leave of the court, may enter a nolle prosequi on an indictment. *United States v. Shoemaker*, 114.

But after the jury are sworn and witnesses, the attorney has no right to enter a nolle prosequi. *Ib.*

Such an abandonment is equivalent to an acquittal. *Ib.*

An indictment which charges the defendant with unlawfully obstructing a letter, containing bank notes, which was put into the postoffice to be conveyed by post and came into the possession of defendant, is sufficient. *United States v. Martin*, 256.

The court will not compel the prosecuting attorney to elect on which count in the indictment he will try the defendant. *United States v. Dickinson*, 325.

Counts are so varied as to meet the evidence. *Ib.*

The court will always regard the rights of the defendant. *Ib.*

An offence described in the words of the statute is, generally, sufficient. *United States v. Lancaster*, 431.

Offences under the postoffice law are misdemeanors, and less nicety is required in the indictment than for felonies. *Ib.*

It is not necessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster. *Ib.*

Nor to describe the bank notes, particularly, inclosed in the letter. *Ib.*

But, if either the letter or the notes be particularly described in the indictment, they must be proved as laid. *Ib.*

INDORSER AND INDORSEE.

A Judgment against an accommodation indorser, who is a surety, and, also, against the drawer, merges the relationship of principal and surety. *Findlay's Executors v. United States Bank*, 44.

A release of a remote indorser, by the holder of a note, is a discharge of the subsequent indorsers. *Hawkins and Davis v. Thompson*, 111.

INJUNCTION.

This Court will not stay proceedings on a judgment in ejectment, until the equity between the parties, of which they have jurisdiction, shall be investigated in a State Court. *John Doe ex dem v. Johnson*, 323.

But such proceedings will be stayed where this Court have not jurisdiction of the parties. *Ib.*

It is a sufficient service of the subpoena, on an injunction bill, to serve it on the attorney of the plaintiff in ejectment. *Ib.*

JUDGMENT.

See LIEN.

A judgment is as final and conclusive in every other State as in the State where it is rendered. *Jacquette v. Hugunon*, 129.

A judgment against several joint trespassers is no bar to an action against another individual for the same trespass. *Matthews and Hopkinson v. Menedger*, 145.

Having several judgments for the same trespass, the plaintiff may make his election on which one he will take out execution. *Ib.*

In such case there can be but one satisfaction. *Ib.*

The record of a judgment can only be received in evidence to bar the plaintiff's action, or to show that certain proceedings under the judgment has changed the right of property. *Ib.*

A Judgment against one of three defendants merges the instrument on which the action is founded. *Woodworth v. Spaffords*, 168.

The act of 3d March, 1837, which provides that judgments shall be given at the return term against the debtors of the United States, on motion, is limited to cases where the principal debtor is a party to the action. *United States v. Lyon*, 249.

No judgment of a State or Territory operates beyond its jurisdiction. *Piatt v. Oliver and Williams*, 267.

Where the defendants, by the misrepresentation of their agent, procured the deputy clerk to receive an assignment of a judgment and depreciated paper, in payment of a judgment, for which he gave a receipt, the plaintiffs are not bound by it, and may issue their execution. *Weldes v. Edsell*, 366.

JUDGMENT—Continued.

Such an arrangement being wholly unauthorized by the plaintiffs, the Court will not set aside the execution. *Ib.*

Judgments in one State have the same effect in every other State. *Lincoln v. Towers*, 473.

The record imports absolute verity and can not be contradicted. *Ib.*
A want of jurisdiction may be objected. *Ib.*

If a suit be commenced by attachment, and there is no personal appearance, the judgment beyond the jurisdiction, and the property levied on, will be of no validity. *Ib.*

The facts on the record, necessary to give jurisdiction, are material, and can not be controverted. *Ib.*

Under the constitution and law of Congress a judgment in one State has the same effect in every other. *Westervelt v. Lewis*, 511.

The record is conclusive. *Ib.*

Where no process was served, and the defendant did not appear, the judgment is a nullity. *Ib.*

JURISDICTION.

Jurisdiction having vested in this Court, it can not be divested by any subsequent proceeding in a State Court. *Campbell v. Emerson*, 30.

The citizenship of both parties must be stated in the declaration to give jurisdiction. *Findlay's Executors v. United States Bank*, 44.

The jurisdiction of this Court must be shown in the pleadings. *Rogers v. Linn*, 126.

A bank receiver, under the Michigan statute, stands in the same relation as the assignee of an insolvent. *Bradford v. Jenks*, 130.
And if such Receiver sue in this Court he must show that the bank might have sued. *Ib.*

Though the note sued on be payable to bearer, yet, as the Receiver does not hold it in that right, he can not sue as the bearer of it. *Ib.*

A note payable to A B, or bearer, may be prosecuted in this Court, by the bearer, without noticing the payee. *Ib.*

The promise to pay is as much to the bearer as to the payee. *Ib.*

JURISDICTION—Continued.

The Jurisdiction of the Territory of Michigan extended south to the northern boundary of Ohio, as at first designated, and until such boundary was altered by the assent of Congress. *Pialt v. Oliver and Williams*, 267.

This alteration can not affect titles to land acquired under the Territory. *Ib.*

Every government can exercise jurisdiction over the persons and property within its limits, but not beyond them. *Lincoln v. Tower*, 473.

Under the act of 1789 the jurisdiction of this Court can only be exercised, as between citizens, where all the plaintiffs could each sue either of the defendants. *Taylor v. Cook*, 516.

The act of 1839 enlarges this jurisdiction by enabling a defendant, voluntarily, to submit himself to the jurisdiction, though he lives out of the State where suit is brought. *Ib.*

The Courts of the United States derive their jurisdiction from the constitution and laws of the United States. *Lorman v. Clark*, 568.

The laws of a State are made obligatory on the Courts of the United States by adoption. *Ib.*

A State can not enlarge or restrict the jurisdiction of the Federal Courts. *Ib.*

A creditor's bill, authorized by the laws of a State, may be filed in the Courts of the United States. *Ib.*

This is no enlargement of the jurisdiction. *Ib.*

It is the application of the ordinary principles of chancery to the enforcement of a new right. *Ib.*

A creditor's bill may be filed independently of the statute. *Ib.*

JURY.

In a patent right case the jury will determine from the models, and other evidence, whether there is a difference, in principle, between the machines. *Smith v. Pearce*, 176.

Under peculiar circumstances a peremptory challenge, by the State laws, may be allowed after the party has expressed himself satisfied with the jury, and after two peremptory challenges have been made by the other party. *Jones v. Vanzandt*, 611.

Laches. Lapse of time. Lease.

LACHES.

Where a note is received, the proceeds to be collected and applied by the creditor to the discharge of his debt, he is bound to use due diligence to collect the note, and to give notice of nonpayment. *Foote and Bowler v. Brown*, 369.

LAPSE OF TIME.

After the lapse of twenty years a presumption of payment of a bond or note arises, and, under peculiar circumstances, it may arise on a shorter time. *Denniston v. McKeen*, 253.

This presumption may be rebutted by circumstances. *Ib.*

Lapse of time does not operate, unless under peculiar circumstances, against an established trust. *Piatt v. Oliver et al.*, 268.

In Indiana the statute of limitations does not run against a nonresident, but lapse of time may bar. *Bowman v. Wathen*, 376.

The ferry of defendant, which was adverse to the plaintiffs', was in operation twenty four years before the decease of Bowman, and twelve years since, and this constitutes a bar. *Ib.*

The nature of the right, claimed by plaintiffs, required peculiar vigilance. *Ib.*

A possession, without claim of title, from mere lapse of time, can afford no presumption of right. *Taggart v. Stanbery*, 543.

LEASE.

A lease under seal may be put an end to by a new and substantial agreement between the parties, for the same premises, which has been sanctioned by a Court of Chancery, and performed by the party. *Scott v. Hawesman*, 180.

A lease, under which no act has been done by the lessee, who has constantly repudiated it, but who has enjoyed the premises the term named in the lease, may be treated by the lessor as a subsisting lease, and he may seek his remedy under it, or he may bring his action and recover the rent on a count for use and occupation. *Ib.*

The defendant, having disclaimed the lease, and refused to perform its conditions, can not defeat the action for use and occupation, by showing that, under the lease, the rent was to be fixed by a third person. *Ib.*

LEX LOCI.

The Courts of the United States are presumed to know the laws of the several States. *Woodworth v. Spaffords*, 168.

The contract is governed by the law of the State where it is made, or where it is to be performed. *Lorman v. Clark*, 568.

This law will be enforced by the Courts of the United States. *Ib.*

It does not give a capacity to these Courts to exercise jurisdiction, but it fixes the rights of litigant parties. *Ib.*

If a local law or usage originate a new right, it may be enforced by the Courts of the United States, sitting within the State, by the exercise of a common law or chancery power. *Ib.*

The Courts of the United States are presumed to know the laws of the respective States, and they will determine who, under the laws of a State, can take depositions. *Jasper v. Porter*, 579.

LIEN.

At common law, a judgment was no lien on the real estate of the defendant. *Shrew and Winter v. Jones*, 78.

But, as his land was made liable to satisfy the judgment under the *elegit*, this created a lien. *Ib.*

In Indiana, there was a judgment lien before the statute. *Ib.*

This was held to be the effect of several statutes, subjecting lands to execution. *Ib.*

By the act of 1818, a lien was created by the judgment, and it extended throughout the State. *Ib.*

The act of 1824 limits the lien to the county where judgment was rendered by the Circuit Courts. *Ib.*

But no restriction was imposed on the judgment liens of the Supreme Court. *Ib.*

The act of 1831 limits judgments of the Supreme Court to the county. *Ib.*

But this law, being passed subsequently to the act of Congress, of 1828, can have no effect on the judgments of the Federal Courts. *Ib.*

The jurisdiction of this Court is coextensive with the limits of the State, and so are the liens of its judgments. *Ib.*

LIEN—Continued.

Prior to the act of 1831, the lien of a judgment in the Supreme Court extended throughout the State. *Ib.*

Under a judgment of this Court, land may be sold on execution, though it may have been sold under a judgment of a State Court, subsequently obtained. *Ib.*

A factor has a lien for all advances, for balances due and liabilities incurred. *Matthews v. Menedger*, 145.

But this is connected with the possession of the property. *Ib.*

If the property is delivered up, the lien ceases. *Ib.*

A judgment was entered, 2d July, 1839, against Beebe, Vantine & Co., in this Court. On the 28th of June, 1839, Vantine executed a mortgage, on a certain tract of land, to secure a debt due the complainant. The mortgage was filed with the recorder of the proper county, for record, the 2d of July. Held that the judgment lien was paramount, as it took effect from the first day of the term, which was the 1st of July. *Bank of Cleveland v. Sturges et al.*, 341.

Chancery will direct property, on which liens exist, to be so disposed of as to satisfy, if practicable, all liens. *Russell v. Howard*, 489.

LIMITATIONS, STATUTE OF.

If the special contract be barred, by the statute, the plaintiff may recover, on a special promise to pay. *Ames v. Le Rue*, 216.

The statute does not run against an established trust. *Piatt v. Oliver and Williams*, 267.

The statute of limitations, in Indiana, does not run against nonresidents. *Bowman v. Wathen*, 376.

But the complainants may be barred by lapse of time. *Ib.*

MARSHAL.

By the statute in Indiana, the Marshal, on a replevy bond, is required to take one or more sufficient freehold security; and, if freehold security be not taken, the Marshal is liable. *Bispham v. Taylor*, 355.

If the sureties be not freeholders, however ample at the time they may be considered, the Marshal is liable. *Ib.*

MARSHAL—Continued.

In this respect, the statute must be pursued. *Ib.*

To examine the county records, &c., not an unreasonable duty on the Marshal. *Ib.*

Where the Marshal takes insufficient bail for the appearance of defendant; he is only responsible for the actual injury sustained by the plaintiff. *Bispham v. Taylor*, 408.

In such case, the insolvency of the defendant may be shown in mitigation of damages. *Ib.*

But when a judgment is replevied, good freehold security must be taken for the payment of the judgment. *Ib.*

If insufficient security be taken, the Marshal is liable. *Ib.*

MORTGAGE.

Where an equity of redemption unites with the legal estate, the former merges in the latter. *Hill v. Smith*, 446.

It is a general principle that, where a greater and a less estate unite in the same person, the latter merges in the former. *Ib.*

A mortgagee has a right to pay off prior incumbrancers, and be substituted to their rights. *Russell v. Howard*, 489.

MOTION.

A motion to quash the bail bond, under the statute of Illinois, may be made at any time during the term, as well after as before judgment. *Postley v. Higgins*, 493.

An affidavit which states, positively, as to the indebtedment, without detailing the source of the knowledge, is sufficient. *Ib.*

NEW TRIAL.

A new trial will not be granted against strong circumstances of equity. *Denniston v. McKeen*, 253.

A new trial will not be granted unless, in the view of the Court, injustice has been done. *United States v. Martin*, 256.

A Court will not grant a new trial, unless the rules of law and purposes of justice require it. *Benedict v. Davis' Adm'r*, 347.

NEW TRIAL—Continued.

Where several counts are abandoned, and the verdict is rendered upon two counts, which do not lay a foundation for the damages found by the jury, a new trial will be granted. *Jones v. Vanzandt*, 612.

NOTICE.

The holder of a check must give notice to the drawer, if payment by the bank be refused. *Sherman v. Comstock*, 19.

A guarantor is entitled to notice of the nonpayment of the note guaranteed. *Lewis v. Brewster*, 21.

In all collateral undertakings, notice is necessary. *Ib.*

If the payee be insolvent when the note becomes due, no notice to the guarantor is necessary. *Ib.*

The indorsement of a clerk, in the office of a notary, on the protest of a note for nonpayment, that notice was duly served, not sufficient. *Whitehead v. Jones*, 28.

The deposition of the clerk should have been taken. *Ib.*

A notice to quit, by the English rule, is necessary, only, where the relation of landlord and tenant subsists. *John Doe ex dem v. Johnston*, 323.

A notice to the agent is notice to the principal. *Bowman v. Wathen*, 376.

The acknowledgment and recording of a conveyance of land, in Indiana, operates as proof of the instrument and notice. *Ib.*

Notice is sufficient if it put the party on inquiry. *Ib.*

Express notice, by circular or otherwise, or publication in a newspaper of general circulation, should be given of the dissolution of a partnership. *Shurlds v. Tilson*, 458.

The latter notice is conclusive on those who have not had dealings with the firm. *Ib.*

OATH.

Where an act of Congress requires an oath to be administered, such oath, under the usage of a department, may be administered by a State officer having the power to administer oaths. *United States v. Winchester*, 135.

OCCUPYING CLAIMANT LAW.

A venire may issue to the Marshal, under the Ohio statute of 1831, the same as to a sheriff, commanding him to summon a jury to value the improvements, &c., of land recovered in an action of ejectment. *Lessee of Dunn's heirs v. Games et al.*, 344.

The Court will not set aside such inquest, though the jurors do not return their assessment under their seals. *Ib.*

No ground, because they assessed no damages for waste, no waste appearing to have been committed. *Ib.*

The lessors of the plaintiff gave notice that they would take the value of the land, as assessed, in its unimproved state; and the Court directed the assessment to be paid within six months, and, in default thereof, that the writ of possession should issue. *Ib.*

PARTIES.

On a note payable to Hicks or bearer, the bearer may sue. *Halsted v. Lyon*, 228.

The bearer is not, within the 11th section of the Judiciary act of 1789, an assignee. *Ib.*

The holder of a note may sue in his own name, with the assent of those who may be interested in the note. *Ib.*

All persons materially interested in the subject matter of the suit, if within the jurisdiction of the Court, must be made parties. *Piatt v. Oliver and Williams*, 267.

There are some cases in which a trustee may sue without naming his cestui que trust. *Ib.*

In general, the cestui que trusts must be parties. *Ib.*

If the demand existed on the trust fund before the trust fund was created, a suit may be sustained against the trustee only. *Ib.*

Where the parties are so numerous as not to be inserted, conveniently, in the record, suit may be maintained in the names of a part, for the whole. *Ib.*

In foreclosing a mortgage, the cestui que trusts are necessary parties. *Ib.*

A sale of the premises, where the cestui que trusts are not made parties, does not bind them. *Ib.*

A note given to an agent of the United States, for their benefit, suit may be brought in their name. *United States v. Boice*, 352.

PARTIES—*Continued.*

All persons, whose interests will be affected by the decree, should be made parties, or excuse stated for not doing so. *Bowman's devisees and Burnley v. Wathen*, 376.

Where the necessary parties are not before the Court, they will direct, generally, that the proper parties be made. *Ib.*

Persons unnecessarily made defendants does not affect the jurisdiction as to those properly before the Court. *Ib.*

An objection, that some of the plaintiffs have no interest, can not be made at the hearing. *Ib.*

PATENT RIGHT.

An invention, to be valid, must be substantially different from any machine or thing in use. *Stanley v. Whipple*, 35.

Under the former law, a patent was void, if the patentee claimed more than he had invented. *Ib.*

Under the act of 1836, a corrected patent has relation back to the emanation of the defective patent. *Ib.*

In such case, a contract to sell the right is made good by the second patent. *Ib.*

A patent, to be valid, must be of some utility. *Ib.*

Same as the above. *Smith v. Pearce*, 176.

An alteration merely formal, or a slight improvement, will give no right. *Ib.*

PARTNERS.

Where a note was given by Abbott and Layton, it is unnecessary to alledge, in the declaration, a partnership. *Davis v. Abbott*, 29.

The instrument shows a joint liability. *Ib.*

The confessions of a partner, after the dissolution of the partnership, are not evidence to charge the firm. *Bispham v. Patterson and Walter*, 87.

Goods were purchased by one of the defendants, for which a promissory note was given; afterwards he entered into partnership with the other defendant, and, by consent of both partners, and the holder of the note, the words, "and company" were added, to make the note stand against the company. Held the note was binding on the firm. *Crum v. Abbott*, 233.

Partners. Payment. Penalty. Pleadings.

PARTNERS—Continued.

In a partnership purchase of land, it is not necessary, except among the partners, to show the sum advanced by each. *Piatt v. Oliver and Williams*, 267.

If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it. *Benedict et al. v. Davis' Adm'r*, 347.

But this holding out must be such as to justify an inference that the creditor had knowledge of it; or, the representation of partnership must have been made to him. *Ib.*

A declaration of an individual that he was a partner, to some four or five individuals, of which the creditor, when he trusted the firm, could have had no knowledge, will not constitute a liability. *Ib.*

Dissolution of partnership should be made known by express notice, or publication in some newspaper of general circulation. *Shurlds v. Tilton*, 458.

PAYMENT.

Circumstances may show that a note was given and received in payment of an account. *Riley v. Van Amringe*, 589.

PENALTY.

The Legislature can not impose an obligation or penalty for an act which, when done, was innocent, and created no moral obligation. *Falconer v. Campbell*, 195.

On a penal bond, a judgment can not be rendered beyond the penalty. *Lawrence v. United States*, 581.

PLEADINGS.

See DECLARATION.

Two affirmative facts in a plea and replication, may be so contradictory, the one to the other, as to make an issue. *Walker v. Johnson, Adm'r*, 92.

As, where the plea averred diligence in the prosecution of a suit, and the replication charged negligence. *Ib.*

The replication should have negatived the affirmation of diligence in the plea, and concluded to the country. *Ib.*

Pleadings.

PLEADINGS—*Continued.*

The general issue to an action on a note, in Indiana, must be sworn to. *McClintick v. Cummins*, 98.

Where, after the jury were sworn and witnesses, the Prosecuting Attorney abandons the prosecution, and the jury are discharged, it may be pleaded in bar of a subsequent indictment for the same offence. *United States v. Shoemaker*, 114.

Nil debet can not be pleaded to an action on a judgment. *Jacquette v. Hugunon*, 129.

This plea brings before the Court the validity of the judgment, and the description of it, as given in the declaration. *Ib.*

A release, the statute of limitations or payment, may be pleaded. *Ib.*

This Court is presumed to know the laws of the different States. In pleading, therefore, a judgment of a State Court of general jurisdiction, it is not necessary to aver that such Court had jurisdiction. *Woodworth v. Spaffords*, 168.

The filing of a plea of puis darrein continuance, waives all prior issues. *Spafford v. Woodruff*, 191.

Such a plea, properly verified, will not be set aside on motion. *Ib.*

The allegations must be denied by plea, or admitted by a demurrer. *Ib.*

By the rule of Court, a plea which denies the instrument on which the action is founded, or the indorsement of it, must be sworn to. *Thomas v. Clark*, 194.

If filed without affidavit, the note and indorsement are admitted. *Ib.*

A plea is bad which states facts that amount only to the general issue. *Halsted v. Lyon*, 226.

It is bad, if it sets up two distinct grounds of defence, either of which is sufficient to defeat the plaintiff. *Ib.*

So, it is bad, if it neither admits nor denies the plaintiff's allegations. *Ib.*

Nil debet, when pleaded to a declaration on a penal bond, where breaches are assigned, will not be set aside on motion, but must be demurred to. *United States v. Spencer*, 405.

Where a plea sets up no new matter of defence, it may be set aside on motion. *Ib.*

The sureties, in a Receiver's bond, are only bound from the date of the bond, and are not liable for any previous defalcation, unless it be specially embraced in the bond. *Ib.*

PLEADINGS—Continued.

A demurrer, filed by the plaintiff, will test the goodness of the declaration. *Ib.*

Where the defendants gave their notes for a tract of land, to which the plaintiff had no title, the defendants may plead the fact. *Scudder v. Andrews*, 464.

A plea may show in what manner, whether by personal service or otherwise, notice was given, as this does not contradict the record, but limits its operation. *Ib.*

Nul tiel record the only plea, except fraud, payment or a release, to an action founded on a judgment. *Ib.*

A plea that the defendant, who was sued as principal, indorsed the note as guarantor, and not as principal, having been demurred to, was held good. *Dibble, Pray & Co. v. Duncan et al.*, 553.

The undertaking of the defendant was collateral, and he can only be made liable in that character. *Ib.*

A special plea, which amounts only to the general issue, is bad. *Ib.*

In assumpsit, there are many defences which may be pleaded specially, or given in evidence, under the general issue. *Ib.*

In special pleas in bar, color to the plaintiff's right must be given. *Ib.*

POSSESSION.

By the common law land could not be conveyed that was possessed adversely. *Bowman et al. v. Wathen*, 376.

POSTMASTER.

A Postmaster, until the action of the Postmaster General, does not vacate his office by remaining out of the neighborhood of the office. *United States v. Pearce*, 14.

If he keep the office by an assistant he remains responsible. *Ib.*

A payment made by a Postmaster of a greater sum than the receipts for the preceding quarter, should be applied as a credit for the quarter, as well before as at the date of the bond. *Lawrence v. United States*, 581.

POSTOFFICE LAW.

A Postmaster, until the action of the Postmaster General, does not vacate his office. *United States v. Pearce*, 14.

POSTOFFICE LAW—Continued.

The 21st section of the postoffice law, which prescribes a punishment for the detention of a letter or packet, means a packet before it reaches its destination. *Ib.*

The taking of a letter, as expressed in the 22d section, means a clandestine, and not an innocent, taking. *Ib.*

POWER OF ATTORNEY.

A power of attorney, which authorizes a conveyance to be made in as full and ample a manner as the principal could execute, authorizes a deed to be made by the attorney with covenants of general warranty. *Taggart v. Stanbery*, 543.

This is, especially, the case where the deed has been accepted with a full knowledge of the power. *Ib.*

A deed, or power of attorney, executed and acknowledged according to the laws of New York, is good in Ohio. *Johnson v. Sukeley*, 562.

A power of attorney to convey land in Ohio, is required to be recorded, by the statute, before the conveyance is executed. *Ib.*

At all events it must be recorded before the deed. *Ib.*

A power which authorizes the attorney to sell and convey lands, does not authorize him to convey lands previously sold. *Ib.*

Except, under peculiar circumstances, the Court will not compel a vendee to accept a deed executed by an attorney. *Ib.*

PRACTICE.

The act of the 3d March, 1797, which provides that judgment shall be given at the return term against debtors of the United States, on motion, is limited to cases where the principal debtor is a party to the action. *United States v. Lyon*, 249.

Where an amended declaration has been taken out of the clerk's office, by the plaintiff, and returned at the first of the term, the Court will not enter a rule for plea instanter. *Walker v. Johnson*, 255.

PRINCIPAL AND SURETY.

See SURETY.

PROMISSORY NOTE.

A note executed in Michigan, payable in New York, in New York funds, or their equivalent, is not negotiable. *Hasbrook and Seaman v. Palmer et al.*, 10.

To bring a note within the statute it must be payable in money. *Ib.* It must be for a sum certain, subject to no conditions. *Ib.*

Where a note was given by Abbott and Layton it is unnecessary, in the declaration, to allege a partnership. *Davis v. Layton*, 29.

A note dated at Cincinnati, and described in the declaration as dated at Cincinnati, in the State of Ohio, is admissible in evidence. *Drake v. Fisher*, 69.

A note payable to A B, or bearer, is payable to either. And the bearer may sue in this Court without an assignment. *Bradford v. Jenks*, 130.

The legal effect of a bond or note, payable on or before the day, is different from one payable on the day. *Kikindal v. Mitchell*, 402.

In the one case the obligor has a right to pay before the day, but not in the other. *Ib.*

On a promissory note given in New York, payable at Detroit, with the current rate of exchange in New York, the rate of exchange may be recovered. *Grutacap v. Woulluse*, 581.

RELEASE.

A release of a remote indorser, by the holder of a note, is a discharge of the subsequent indorsers. *Hawkins and Davis v. Thompson*, 111.

RIPARIAN RIGHTS.

The rights of a proprietor, bounded by a navigable river, extends to high water mark; if the river be unnavigable, to the middle of the stream. *Bowman's Devises v. Wathen*, 376.

By the common law rivers are only navigable as high as the tide ebbs and flows; this not so in this country. *Ib.*

The riparian right is protected as any other right. *Ib.*

The right to apply for a ferry license attaches to the proprietor, and this can not be taken from him and given to another without compensation. *Ib.*

Riparian Rights. Sheriff. Stage Proprietor. Slavery.

RIPARIAN RIGHTS—*Continued.*

The owner of land, bounded by a navigable river, may convey the soil, and except the right of ferry. *Ib.*

The difference between a reservation and an exception in a grant. *Ib.*

The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as an advowson. *Ib.*

In such a case the grantee has a right to use the soil for ferryways, but for no other purpose. *Ib.*

A ferry right, in Indiana, may be assigned. *Ib.*

SHERIFF.

A Sheriff is liable for the acts of his deputy. *Chute v. Goodell*, 193.

Proof that a Sheriff or other officer acted as such is sufficient. *Lawrence v. Sherman*, 488.

Where a deputy sheriff sold property under a defective execution, the principal having sanctioned the proceeding, is liable. *Ib.*

STAGE PROPRIETOR.

A contract made by stage passengers with the agent of the line can not be proved by a passenger who did not know of the contract. 157.

Such contract could not have influenced such passenger. *Ib.*

Stage proprietors are bound to use the greatest care for the safety of passengers, the least neglect by the driver, or want of skill, makes them liable. *Ib.*

They are liable if the coach be driven out of the usual track, and an injury is, consequently, done. *Ib.*

It is the duty of a driver to give notice when about to pass over a dangerous place. *Ib.*

SLAVERY.

Slavery exists, only, by virtue of the laws of the States where it is sanctioned. *Jones v. Vanzandt*, 596.

If a slave abscond from the State where he is held to service, into a jurisdiction where slavery is not tolerated, he is free. *Ib.*

SLAVERY—Continued.

And this would be the law of these States, had not the constitution made a provision that such slave should be delivered up on claim of his master. *Ib.*

STATUTE OF FRAUDS.

The late decisions in England require an agreement to pay the debt of another to state the consideration. *How & Co. v. Kemball*, 103.

Prior to these decisions the rule was otherwise. *Ib.*

In this country the weight of authority is not with the English decisions. *Ib.*

A guarantor, who having the interest in a note assigns it, and adds an increased obligation, is bound, the assignment being a contract, &c. *Ib.*

Under the Statute of Illinois a declaration of trust unrecorded is inoperative. *Hubbard v. Turner*, 579.

SURETY.

A debtor has a right, without the assent of his surety, to convey his property, fairly, in payment of his debts. *Findlay's Executors v. United States Bank*, 44.

If the holder of a bill, for a valuable consideration, give time to the maker of the note the surety is discharged. *Fuller v. Milford*, 74.

A surety has a right to pay the note, and be subrogated to the rights of the holder. *Ib.*

By the laws of Indiana the surety may give notice to the holder of a note, and compel him to prosecute. *Ib.*

In some cases, by bill, independently of any statute, the holder may be required to use active diligence. *Ib.*

If the holder of a note give time to the maker, for a valuable consideration, the surety is released. *Suydam & Co. v. Vance*, 99.

If on confession of a judgment, by the principal, with stay of execution, no more time is given than would have been required to obtain judgment, surety not released. *Ib.*

Time given to the principal, at the instance of the surety, or with his consent, does not release him. *Ib.*

Surety. Tenant. Title. Treaty, Indian.

SURETY—Continued.

A surety on a Receiver's bond is not liable for any defalcation prior to the date of the bond. *United States v. Spencer*, 405.

The surety, by giving notice to the creditor, and requesting him to sue the principal debtor, who is in failing circumstances, does not release himself, though the principal should become insolvent. *Dennis v. Rider*, 451.

The relief of the surety, under such circumstances, is in equity. *Ib.* Where the obligee changes the contract, by giving longer time, &c., the surety is discharged, and this may be set up at law. *Ib.*

The surety, on the payment of the debt, is entitled to all securities in the hands of the obligee. *Ib.*

Sureties on a government bond are only bound for a faithful discharge of duty, by the principal, subsequently to the date of the bond. *United States v. Linn et al.*, 595.

The government can not change the nature of this liability by the application of payments. *Ib.*

Among different sets of sureties a just application of payments should be made. *Ib.*

TENANT.

A tenant who has done nothing under a lease, but has uniformly repudiated it, can not set up such lease to defeat the action for use and occupation. *Scott v. Hausman*, 180.

The tenant, under such circumstances, having occupied the premises under a prior lease, may be considered as holding over. *Ib.*

Having refused to abide by the lease, he can not complain of being obliged to pay a reasonable rent. *Ib.*

TITLE.

Where he who holds the legal estate purchases the equity, the latter merges in the former. *Hill v. Smith*, 446.

This applies to a mortgagee who purchases the equity of redemption. *Ib.*

TREATY, INDIAN.

The fee in unsold lands is either in the Federal or State Governments. *Godfrey v. Beardsley*, 412.

TREATY, INDIAN—Continued.

The Indians have a right of use, which can only be divested by purchase or war. *Ib.*

An Indian Treaty which cedes lands within certain boundaries, reserving certain parts, does, in no respect, change to such parts the original right. *Ib.*

But if a treaty declares there shall be granted certain tracts, designated, to certain persons, and, in the same article, these are referred to as grants, they are held to operate as such. *Ib.*

The treaty is best explained by itself. *Ib.*

Where Indians, with the assent of the President, may convey their lands, that consent may be given in such form as the executive shall deem proper. *Ib.*

TRESPASS.

An officer making a seizure of goods, without reasonable cause, is liable to damages, in an action of trespass, for the full amount of the injury. *Hall v. Warren et al.*, 332.

The circumstances may be proved in mitigation of damages, but not to excuse or justify the seizure. *Ib.*

There can be no justification of the act of seizure, except on a judgment of condemnation, or a certificate of reasonable cause. *Ib.*

Having possession of the goods, and exercising acts of ownership over them, the plaintiff may sue, for a trespass on them, in his own name. *Ib.*

TRIAL.

After the jury are sworn, and witnesses, in a criminal case, the prosecuting attorney has no right to enter a nolle prosequi on the indictment. *United States v. Shoemaker*, 114.

An abandonment of the prosecution, under such circumstances, is equivalent to an acquittal. *Ib.*

Under certain emergencies the Court may discharge a jury in criminal cases. *Ib.*

Trustee. Usage. Use and Occupation. Vendor and Vendee. Venue.

TRUSTEE.

In cases where the object of the suit is to divest the cestui que trust of title, they must be made parties. *Piatt v. Oliver and Williams*, 267.

The act of a trustee shall not prejudice his cestui que trust. *Ib.*

If a trustee purchase land, with the trust fund, and takes the deed in his own name, he holds the same in trust. *Piatt v. Oliver and Williams. Ib.*

Whatever acts are done by the trustee are presumed to be done for the benefit of the cestui que trust. *Ib.*

Where the trust fund is converted into other species of property, if the identity can be traced, it is liable in its new form to the cestui que trust. *Ib.*

In such case the trustee may take the property, or pursue some other remedy. *Ib.*

This doctrine applies to all who act in a fiduciary capacity. *Ib.*

USAGE.

The usage of the office of a Notary, as to giving notice, can not make that evidence which is not evidence. *Whitehead v. Jones*, 28.

USE AND OCCUPATION.

An action for use and occupation may be maintained against a tenant who has occupied the premises, having disclaimed the lease, &c. *Scott v. Hawsman*, 180.

VENDOR AND VENDEE.

Where the deed is to be made before full payment of the consideration, the vendor has no right to ask the money to be brought into Court, on a bill, by the vendee, for a specific execution. *Johnson v. Sukeley*, 562.

Nor has the vendor, when he is in default, a right to ask the money to be brought into Court. *Ib.*

VENUE.

A venue in the body of the declaration is sufficient, without being stated in the margin. *Dwight v. Wing*, 580.

VENUE—Continued.

By the present rule in England a venue is laid in the margin only.
Ib.

VERDICT.

After verdict defects in the declaration, in substance, are cured, if, from the issue, the facts omitted must have been proved on the trial. *Stanley v. Whipple*, 35.

A verdict may be amended where there is a mistake in form. *Jones v. Vanzandt*, 612.

What shall constitute a good finding. *Ib.*

Under the Statute of Ohio a count must be abandoned before the jury retire to consult of their verdict. *Ib.*

WITNESS.

A witness must have a direct interest to render him incompetent.
Suydam & Co. v. Vance, 99.

To discredit a witness it is not competent to prove general bad character disconnected with veracity. *United States v. Vansickle*, 219.

The proper inquiry is, what is the general character of the witness, where he resides, for truth. *Ib.*

And the witness under examination may be asked, from your knowledge of his general character would you believe him under oath.
Ib.

Particular facts can not be proved to discredit a witness, the inquiry must be general. *Ib.*

In an action between the holder of a bill and the indorser, the maker, the defendants having released their costs, is a competent witness to show that, after the note passed out of his hands, it has been altered. *Ib.*

But he can state no facts to impeach the note at the time he assigned it. *Ib.*

His statement must be limited to facts after the note had passed out of his hands. *Ib.*

A person convicted of an infamous offence, if not sentenced, is a competent witness. *United States v. Dickinson*, 325.

Witness.

WITNESS—Continued.

A witness is not obliged to answer a question which would show him to be infamous. *Ib.*

The character of a witness must be impeached by general questions as to his truth. *Ib.*

On the cross-examination of a witness a question irrelevant to the matter, in issue, can not be asked to impeach him. *Ib.*

Nor can a witness be impeached by proving a statement different from the one sworn to, unless he has been questioned as to his having made such statement. *Ib.*

Leading questions can not be asked a witness, except on cross-examination. *Ib.*

To render a witness incompetent he must be interested in the event of the suit. *Bork v. Norton, 423.*

He is incompetent if the verdict can be given in evidence either for or against him. *Ib.*

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